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IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY AND
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES AND
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR PSEG NUCLEAR, LLC AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

JAY E. SILBERG
Counsel of Record
ALEX D. TOMASZCZUK
DANIEL S. HERZFELD
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000

Counsel for Respondents
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC
AND GAS COMPANY

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QUESTIONS PRESENTED

1. Where the Assignment of Claims Act is intended to protect the interests of the Respondent the United States ("the Government"), may the Government waive the requirements of that Act and accept an assignment of claims that a duly-constituted arbitration panel determined had been transferred to Respondent PSEG Nuclear, LLC ("PSEG") in connection with PSEG's purchase of Petitioners' interests in the nuclear plants?

2. Given the Government's written consent to the assignment of Petitioners' takings claims and its knowing waiver of the requirements of the Assignment of Claims Act, were the U.S. Court of Federal Claims, the U.S. Court of Appeals for the Federal Circuit, the arbitration panel, and the New Jersey state courts correct in recognizing the assignment as valid, where the Purchase Agreements transferred any takings claims to PSEG and gave PSEG complete control over any litigation regarding those claims, where Petitioners failed to notify PSEG that any takings claims existed as required by the Purchase Agreements, and where PSEG itself has pleaded a takings claim against the Government, thereby leaving PSEG as the sole claimant against the Government?

CORPORATE DISCLOSURE STATEMENT

PSEG Nuclear, LLC is a wholly-owned subsidiary of PSEG Power, LLC. PSEG Power, LLC is a wholly-owned subsidiary of Public Service Enterprise Group, Incorporated, a publicly-traded holding company. Public Service Electric and Gas Company is the predecessor in interest to PSEG Nuclear, LLC; Public Service Electric and Gas Company has issued no shares to the public and is a wholly-owned subsidiary of Public Service Enterprise Group, Incorporated, a publicly-traded holding company.

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BRIEF FOR PSEG NUCLEAR, LLC AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those provisions set forth in Petitioners' appendix ("Cert App."), Respondents PSEG Nuclear, LLC and Public Service Electric and Gas Company (together "PSEG") submit the pertinent provisions of Article III and Article IV, Section 1 of

the U.S. Constitution, 28 U.S.C. § 1738 (2006), and the Federal Arbitration Act, 9 U.S.C. §§ 9, 10, & 13 (2006) in the attached Appendix at 73a-78a ("PSEG App.").

STATEMENT OF THE CASE

PSEG built, and since their completion, has operated the Hope Creek and Salem nuclear generating plants. Initially, PSEG owned 95% of the Hope Creek unit, with Petitioner Atlantic City Electric Company ("ACE") owning the remaining 5%. With respect to the Salem facility, PSEG initially owned 42.59%, Philadelphia Electric Company[1] owned 42.59%, and ACE and Petitioner Delmarva Power & Light Company ("Delmarva") each owned 7.41%. *See generally In re Atlantic City Elec. Co.*, 90 F.E.R.C. ¶ 61,268, at 61,897-98 (2000) (discussing ownership percentages of ACE, Delmarva, and PSEG before and after sale).

In 1983, as required by the Nuclear Waste Policy Act, 42 U.S.C. § 10222 (2006), PSEG entered into contracts on its behalf and on behalf of its co-owners with the U.S. Department of Energy ("DOE") for the disposal of the spent nuclear fuel generated by Hope Creek and Salem. PSEG App. at 59a-60a. As a result of the DOE's breach of its obligation to begin accepting spent nuclear fuel by 1998, all nuclear utilities filed breach of contract lawsuits in the U.S. Court of Federal Claims ("CFC") against the United States. PSEG filed its lawsuit in 2001. The Petitioners filed their lawsuits in 2004. The Petitioners' lawsuits initially alleged that the Government's failure to perform caused a Fifth Amendment taking, but they later added "protective" claims for breach of con-

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[1] Philadelphia Electric Company is now known as PECO Energy Company and is a subsidiary of Exelon Corporation.

tract. *See Delmarva Power & Light Co. v. United States*, 79 Fed. Cl. 205, 207 (2007) ("*Delmarva I*"), Cert App. at 15a-16a.

Petitioners' brought their lawsuits five years after they sold their small, minority interests in the Hope Creek and Salem facilities to PSEG for $30 million. *See Delmarva Power & Light Co. v. United States*, 542 F.3d 889, 891 (Fed. Cir. 2008) ("*Delmarva II*"), Cert App. at 3a. The 1999 sale was made "to comply with state and federal regulatory policies," Cert Pet. at 6. The sale was reviewed and approved by the New Jersey Board of Public Utilities, which concluded that ACE and Delmarva received fair market value for the sale of their interests, the position put forward by ACE and Delmarva before that regulatory agency. *See In re Atlantic City Elec. Co.*, No. EM 99110870, 2000 WL 1273700, at *11-14 (N.J.B.P.U. July 21, 2000).[2]

The purchase agreements between PSEG and Petitioners for the sale of Petitioners' minority interests in the Salem and Hope Creek plants ("Purchase Agreements") set out in great detail the rights that

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[2] The Board of Public Utilities' decision directly contradicts the claim in the National Association of Regulatory Utility Commissioners' ("NARUC") brief Amicus Curiae that ACE and Delmarva did not receive fair market value for their small shares of the Hope Creek and Salem stations. *See* NARUC Brief at 3-5; *In re Atlantic City Elec. Co.*, 2000 WL 1273700, at *14 ("Based on the foregoing factors, the Board concludes that the sale of the Company's interest in its nuclear generating assets to PSEG Power and PECO reflects the full market value of the assets."). NARUC's support for its claim was the assertion by the New Jersey Ratepayer Advocate which the Board of Public Utilities did not adopt. *See* NARUC Brief at 4 n.7; *In re Atlantic City Elec. Co.*, 2000 WL 1273700, at *12-13. Notably, Petitioners did not make the claim advanced by NARUC.

PSEG purchased for value, as well as the rights retained by ACE and Delmarva. The Purchase Agreements provided that PSEG "shall have all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel." Purchase Agreements § 2.6, PSEG App. at 70a.[3] The Purchase Agreements expansively defined the assets that PSEG was purchasing. Purchase Agreements § 2.1, PSEG App. at 61a-63a. Among the purchased assets were ACE and Delmarva's claims against the Government relating to the Government's failure to remove spent nuclear fuel:

> All claims of Seller [Delmarva or ACE] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets . . . .

Purchase Agreements § 2.1(l), PSEG App. at 63a; *Delmarva II*, 542 F.3d at 892, Cert App. at 4a-5a. More broadly, the Purchase Agreements assigned all of ACE and Delmarva's claims against any third-parties to PSEG and recognized this assignment as part of PSEG's purchased assets:

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[3] For ease of reference, PSEG includes excerpts of only one of the Purchase Agreements in the appendix because of the materially identical terms of the Agreements as pertinent to this case.

> The rights of Seller [Delmarva or ACE] in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date . . . .

Purchase Agreements § 2.1(m), PSEG App. at 63a. Significantly, ACE and Delmarva also agreed that PSEG "shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities . . . ." *Id.* § 2.5(b), PSEG App. at 69a.

In addition to the $30 million purchase price, PSEG assumed a long list of Petitioners' liabilities as part of the consideration for PSEG's purchase, including "all on-site environmental liabilities" and "all decommissioning liabilities associated with the Nuclear assets." *See, e.g., In re Atlantic City Elec. Co*, 2000 WL 1273700, at *9. ACE and Delmarva did not have to provide any funds toward the decommissioning trust fund as would normally be the case in the sale of nuclear assets. *See, e.g., id.* PSEG assumed "[a]ll liabilities and obligations of [ACE and Delmarva] in respect of Spent Nuclear Fuel" with only a single exception not relevant to this case. Purchase Agreements § 2.3(f), PSEG App. at 68a.

The Purchase Agreements specifically defined the assets that were excluded from the sale in fourteen specific asset categories. *Id.* § 2.2, PSEG App. at 64a-68a. ACE and Delmarva point to no provision that even suggests that the takings claims that ACE and

Delmarva assert that they retained were among the assets that ACE and Delmarva did not sell to PSEG.[4]

Additionally, the Purchase Agreements required Delmarva and ACE to disclose to PSEG any eminent domain or takings claims that existed prior to closing the sale of their interests. *Id.* § 6.8, PSEG App. at 70a-71a.

> [I]f before the Closing Date, all or any portion of the Purchased Assets is . . . condemned or taken by eminent domain or is the subject of a pending or threatened condemnation or taking which has not been consummated . . . Seller shall notify Buyer promptly in writing of such fact, and . . . in the case of a condemnation or taking, Seller shall assign or pay, as the case may be, any proceeds thereof to Buyer at the Closing . . . .

Id., PSEG App. at 70a. ACE and Delmarva never notified PSEG of any pending or threatened taking by the Government prior to the closing of the sale of their Hope Creek and Salem minority shares to PSEG.

One of the most material events impacting this case—and one that is nowhere to be found in the Petition—is the parties' arbitration as to the assignment of Petitioners' takings claims. In view of lawsuits that Petitioners filed notwithstanding the provisions of the Purchase Agreements, in January 2007 PSEG invoked the Purchase Agreements' arbitration provision based on Petitioners' assignment of

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[4] The Excluded Assets explicitly identified other litigation claims that ACE and Delmarva retained. Purchase Agreements § 2.2(l), PSEG App. at 66a-67a (claims relating to the DOE Decommissioning and Decontamination fees); *id.* § 2.2(m), PSEG App. at 67a (pending action against Westinghouse Electric Corporation).

their takings claims against the United States to PSEG. *See Delmarva I*, 79 Fed. Cl. at 208-09, Cert App. 17a-18a.[5] Shortly thereafter, Delmarva and ACE filed their own arbitration demand pursuant to the Purchase Agreements, asserting that no such assignments had been made. The CFC stayed ACE and Delmarva's cases pending the resolution of the arbitration. Thereafter, Delmarva, ACE, and PSEG entered binding arbitration to determine whether Petitioners had assigned their takings claims against the Government to PSEG.

On June 20, 2007, a three-person arbitration panel that included retired-Judge Michael Mukasey (and later Attorney General of the United States) issued a decision concluding that "ACE/Delmarva assigned the takings claims at issue here to PSEG, and that ACE/Delmarva's initiation of its takings litigation and its refusal to dismiss the litigation breached the [Purchase Agreements]." PSEG App. at 24a. Looking at the language in the Purchase Agreements (quoted above, in pertinent part), the arbitration panel ruled:

> These broad assignments make no exceptions for particular kinds of claims, and the detailed Excluded Assets list in the [Purchase Agreements] make no mention of any takings claims. . . . It is hard to imagine a more comprehensive assignment of claims. On their face, the [Purchase Agreements] leave no doubt that the takings claims at issue here were assigned to PSEG and

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[5] The Purchase Agreements' arbitration mechanism provides "the sole remedy available to either Party" in the event of a dispute "'relating to or arising out of any provisions of'" the Purchase Agreements. Purchase Agreements § 8.3(a), PSEG App. at 71a-72a.

> that PSEG received the exclusive right to control the litigation over the claims.
>
> * * * *
>
> The Purchased Assets explicitly include [spent nuclear fuel ("SNF")], and the takings claims indisputably arise out of or are in connection with [the Department of Energy's] failure to take SNF. Accordingly, it is irrelevant whether the takings claims arise from the Standard Contract or from some other source—in either case, they are covered by the [Purchase Agreements'] assignment clauses.

Id. at 18a-19a.

On June 22, 2007, PSEG filed a complaint in the Superior Court of New Jersey ("Superior Court") to confirm the arbitration award. *Delmarva I*, 79 Fed. Cl. at 210, Cert App. at 20a. As PSEG pursued confirmation of the arbitration award in the Superior Court, ACE and Delmarva moved to vacate the arbitration ruling before the CFC, which denied the motion for lack of jurisdiction. *Delmarva I*, 79 Fed. Cl. at 210, 213, Cert App. at 20a, 29a ("[T]his court does not possess the power to disturb an arbitration created by an agreement between private parties and involving those private parties. For this reason, plaintiffs' motion to vacate the arbitration ruling is denied."). In the course of the CFC's proceedings on ACE and Delmarva's motion to vacate the arbitration decision, the Government accepted Delmarva and ACE's assignment of their takings claims to PSEG. Cert App. at 51a-54a.

On December 19, 2007, the Superior Court confirmed the arbitration award to PSEG over Delmarva and ACE's objections. The New Jersey court ruled

that whether the arbitration panel's ruling "will relieve the United States from its obligation to pay just compensation for its taking is irrelevant towards determining the scope of the arbitration clause in the [Purchase] Agreements." PSEG App. at 48a. The New Jersey court further noted:

> The arbitration panel's function was not to determine the ultimate result from the assignment of [Delmarva and ACE's] takings claims, but whether [Delmarva and ACE's] takings claims were in fact transferred to [PSEG] as part of the Purchased Assets under the [Purchase] Agreements. Nor did the arbitration panel decide what would become of [Delmarva and ACE's] takings claims; rather it simply found that the Agreements' assignment language included [Delmarva and ACE's] takings claims and that the Assignment of Claims Act did not act as an absolute prohibition of [Delmarva and ACE's] assignment of their takings claims to Plaintiffs.

Id. The Superior Court confirmed the arbitration award. Delmarva and ACE appealed the decision confirming the award to the Superior Court of New Jersey—Appellate Division, but withdrew their appeal after the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") in *Delmarva II* affirmed the CFC's decision in *Delmarva I* regarding the Government's ability to waive the Assignment of Claims Act. The New Jersey appellate court then dismissed the appeal. PSEG App. at 58a.

REASONS FOR DENYING THE PETITION

The Federal Circuit's decision is correct—the Government may waive the requirements of the Assignment of Claims Act. Contrary to ACE and Del-

marva's contentions, the Federal Circuit decision is consistent with Supreme Court precedent, the Fifth Amendment, and the Assignment of Claims Act. The Federal Circuit properly applied the law to the facts of this unremarkable case. Even aside from the Assignment of Claims Act issue, the Federal Circuit also could have simply upheld the CFC's determination that it lacked jurisdiction to overturn the arbitration decision, which conclusively determined that ACE and Delmarva had no right to pursue their takings claims. Thus, ACE and Delmarva can receive no further relief rendering this appeal moot.

I. THIS COURT'S PRECEDENT ALLOWS THE GOVERNMENT TO WAIVE THE REQUIREMENTS OF THE ASSIGNMENT OF CLAIMS ACT

Contrary to Petitioners' attempt to turn the Government's Assignment of Claims Act shield into Petitioners' sword, the Federal Circuit properly concluded that the Government may recognize an assignment and waive the application of the Assignment of Claims Act. *See Delmarva II*, 542 F.3d at 893, Cert App. at 8a ("We see no valid reason why the government should not . . . be able to waive the Anti-Assignment Act's prohibition in section 3727(a) against the assignment of claims."). This Court has regularly noted that the Act's "sole purpose was to protect the government, and not the parties to the assignment." *Goodman v. Niblack*, 102 U.S. 556, 560 (1880); *see also Martin v. Nat'l Surety Co.*, 300 U.S. 588, 594 (1937) ("The provisions of the statute making void an assignment or power of attorney by a Government contractor are for the protection of the Government.").

This Court (and lower courts) have repeatedly stated that the Assignment of Claims Act protects the Government, among other ways, by assuring that the Government will not have to face multiple claimants. *See United States v. Dow*, 357 U.S. 17, 26 (1958) ("To require the Government to deal with more than one party, particularly when division of the condemnation award would entail a complex apportionment, might severely impede the orderly progress of condemnation proceedings and would conflict with the policies underlying the Anti-Assignment Act."); *Hobbs v. McLean*, 117 U.S. 567, 576 (1886) (stating that the Assignment of Claims Act, among other acts, was "passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal"); *Keydata Corp. v. United States*, 504 F.2d 1115, 1118 (Ct. Cl. 1974) ("'Over the years [the Assignment of Claims Act] has consistently been recognized by the courts to have two purposes—primarily, to prevent fraud; and secondarily, to avoid multiple litigation.'") (quoting *Patterson v. United States*, 354 F.2d 327, 329 (Ct. Cl. 1965)). ACE and Delmarva's lawsuit flies in the face of this fundamental purpose of the Act. They seek here to void an assignment and employ the Act to assure that the Government will face multiple litigants. ACE and Delmarva effectively request that this Court turn the Act upside down by requiring the Government to defend claims by multiple litigants—Delmarva, ACE, and PSEG—involving the same two power plants (Salem and Hope Creek). The lower courts' conclusions better comport with the purpose of the statute by allowing the Government to recognize the assign-

ment of the takings claims, thus leaving PSEG as the sole claimant.[6]

Because the Act is for the sole benefit of the Government and its purpose is to allow the Government to avoid facing multiple litigants, the Government may waive the Act's protection to face only one litigant. This Court has long held that the Government may recognize a claim, even where an assignment violates an explicit requirement of the Act. In *Bailey v. United States*, 109 U.S. 432, 435-436 (1883), an assignor that had executed a power of attorney attempted to recover an amount from the Government, which paid the assignee attorney-in fact. The assignment of claims in *Bailey* occurred prior to the Government allowing the claim and before a warrant issued for payment—both requirements of the Act that ACE and Delmarva incorrectly assert may never be waived.[7] *See id.* at 438-39 ("The question is whether payment to one who has been authorized to receive it, by the power of attorney executed *before the allowance of the claim by act of Congress*, was

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[6] In their Cert Petition at 16, ACE and Delmarva complain that the Federal Circuit relied on cases relating to the Assignment of Contracts Act, 41 U.S.C. § 15 (2006) and that the Federal Circuit mistakenly treated the Assignment of Contracts Act and the Assignment of Claims Act as being essentially interchangeable. However, this Court has similarly discussed both statutes interchangeably and recognized that the two statutes have the same goal of protecting the Government. *See Hobbs*, 117 U.S. at 574, 576 ("The sections under consideration [including the Assignment of Claims Act and the Assignment of Contracts Act] were passed for the protection of the government.").

[7] *See* 31 U.S.C. § 3727(b) (2006) ("An assignment may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued."), Cert. App. at 42a.

good as between the government and claimant, where, at the time of payment, such power of attorney was unrevoked.") (emphasis added); *see also Ball v. Halsell*, 161 U.S. 72, 79 (1896) (discussing *Bailey* and noting that the Assignment of Claims Act did not "enable the original claimant to recover of the United States a sum once paid by the United States to his attorney in fact, holding a power of attorney, *made before allowance of the claim and the issue of the warrant*, and remaining unrevoked") (emphasis added); *Freedman's Savs. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888) (noting that the Government could have refused to recognize an assignment because it failed to comply with the Assignment of Claims Act, but "[h]ere, the officers of the government chose to recognize the assignment"). In *Bailey*, the Government paid the assignee attorney-in-fact and recognized the assignment; this Court approved the practice. *See Bailey*, 109 U.S. at 440 ("It seems to us—looking at the mischiefs intended to be remedied by these statutes and giving the words of Congress a reasonable interpretation—that the claimants were not at liberty, as between the government and themselves, to question the right of the officers of the treasury to recognize the unrevoked authority which the latter had given [the agent assignee], without restriction as to time, to receive from any one whom it might concern to pay all sums of money due or to become due and payable . . . ."). Thus, this Court has approved the Government's practice of recognizing assignments that fail to meet the requirements of the Assignment of Claims Act.[8]

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[8] ACE and Delmarva assert that *McKnight v. United States*, 98 U.S. 179 (1878) concluded that the Government "could not waive" the Assignment of Claims Act on an "unascertained"

Moreover, ACE and Delmarva seek to invoke the Assignment of Claims Act to protect their interests to the detriment of the Government and PSEG. Yet, this Court has stated that private parties may not invoke the Assignment of Claims Act to void an assignment as against the United States or other private parties. *Bailey*, 109 U.S. at 439 (reasoning that where Government "officers chose to make payment to the person whom the claimant, by formal power of attorney, has accredited to them as authorized to receive payment, *the claimant cannot be permitted to make his own disregard of the statute the basis for impeaching the settlement had with his agent*") (emphasis added); *see also McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945) ("The provisions of the statute governing assignments of claims against the Government are for the protection of the Government and not for the regulation of the equities of the claimants as between themselves."); *Centron Corp. v. United States*, 585 F.2d 982, 986 n.3 (Ct. Cl. 1978) ("The Act . . . does not invalidate any contractual rights or equities as between the private parties to an assignment that does not satisfy the Act."). ACE and Delmarva have cited to no cases, and we know of none, where a private party successfully invoked the

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claim. Cert Pet. at 12. However, *McKnight* actually concluded that the Government may waive the Act by paying an assignee. *McKnight*, 98 U.S. at 185-86 ("It is true the assignment was contrary to law, and therefore a nullity, but there was nothing contrary to good morals or conscience in the payment or receipt of the money."). Also, *McKnight* did not involve an "unascertained" portion of a claim. The unpaid amounts in *McKnight* were not "unascertained," but instead related to the Government's decision to set off a debt owed by the assignor from the payment made to the assignees. *See id.* at 186.

Assignment of Claims Act to challenge the Government's waiver of the Act's requirements.

In contrast to the precedent discussed above, ACE and Delmarva seek to rely on the construction of the Assignment of Claims Act found in *Spofford v. Kirk*, 97 U.S. 484, 489-90 (1878), *United States v. Gillis*, 95 U.S. 407 (1877), *Nutt v. Knut*, 200 U.S. 12 (1906), and *National Bank of Commerce v. Downie*, 218 U.S. 345 (1910). *See* Cert Pet. at 12-16. Yet, the Federal Circuit was correct to limit the reach of this line of cases. This Court itself did so over 70 years ago. In 1937, this Court reviewed these exact four cases, noted that they strictly construed the Act, but also noted that "[a]nother line of cases exhibit an opposing tendency." *Martin*, 300 U.S. at 596 (citing, *inter alia*, *Goodman*, *Bailey*, and *Freedman's Savings*).[9] The Court expressed its preference for the second line of cases, which "teach us that the statute must be interpreted in the light of its purpose to give protection to the Government." *Id.; see also id.* at 597 ("To the extent that the two lines of cases are in conflict, the second must be held to be supported by the better reason."). Thus, this Court rejected ACE and Delmarva's primary contention over 70 years ago.[10]

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[9] Long before *Martin*, in *Bailey* this Court distinguished *Spofford*'s construction of the Assignment of Claims Act to void an assignment between two private parties. *Spofford*, 97 U.S. at 489-90. In *Bailey*, this Court acknowledged that "[n]o question arose in that case [*Spofford v. Kirk*] as to what would have been the effect upon the rights of the claimant had the officers of the government recognized the assignment to Spofford." *Bailey*, 109 U.S. at 437.

[10] ACE and Delmarva failed to mention *Martin*, much less distinguish it in their petition.

II. THE FEDERAL CIRCUIT'S CONCLUSION NEITHER CONFLICTS WITH *DOW* NOR EXTINGUISHES A FIFTH AMENDMENT TAKINGS CLAIM

Contrary to Petitioners' assertion, Cert Pet. at 9-11, the Government may recognize an assignment of a takings claim and waive the Assignment of Claims Act just as it may do so for any other type of assigned claim. The Federal Circuit's conclusion below does not conflict with *United States v. Dow*, 357 U.S. 17 (1958). Nor do the decisions below extinguish any takings claims under the Fifth Amendment, because PSEG has pled a takings claim against the Government (albeit under a different theory of recovery).

In *United States v. Dow*, the Government actively opposed an assignment of a takings claim and moved for summary judgment, seeking dismissal of the assignee-plaintiff's untimely claim as filed outside the statute of limitations. *See, e.g., Dow*, 357 U.S. at 19. The Government did not waive the Assignment of Claims Act; quite the opposite. The Government actively opposed the assignee's right to make a claim. Here, the Government has recognized the assignment consistent with the conclusion of a confirmed arbitration decision between PSEG, ACE, and Delmarva.

ACE and Delmarva also misread the import of *Rochester Gas & Elec. Co. v. United States*, 65 Fed. Cl. 431 (2005). *See* Cert Pet. at 11. The Government never recognized the assignment of the takings claim involved in *Rochester*. *See generally Rochester*, 65 Fed. Cl. at 441-42. Moreover, unlike here, the buyer in *Rochester* did not previously own and operate the nuclear plant at issue. *See id.* at 433. Additionally, the sale in *Rochester* only involved a partial assignment, leaving the seller with future obligations to the

Government such as the "one-time fee payment" owed to the Government when performance eventually begins under the Standard Contracts. *See id.* Here, the assignment was complete, not partial; and, in fact, the arbitration panel noted that "[i]t is hard to imagine a more comprehensive assignment of claims." PSEG App. at 18a.[11]

Also, ACE and Delmarva exaggerate the effect of the Federal Circuit's ruling, claiming it will "extinguish" a takings claim here and allow the Government "*to prevent any property owner* from receiving just compensation for a taking" under the Fifth Amendment in numerous other cases. Cert Pet. at 11, 19 (emphasis in original). Here, however, PSEG is pursuing a takings claim against the Government regarding the Hope Creek and Salem plants, albeit under a different theory of recovery. The Government's recognition of the assignment to PSEG has not extinguished the takings claim merely because PSEG is pursuing the takings claim under a different theory than ACE and Delmarva intended to pursue. There is no danger in this case (or in similar suits in-

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[11] In view of Petitioners' reliance on *Rochester*, it is noteworthy that the trial judge in *Rochester* later dealt with the assignment issue in another spent nuclear fuel case—*Boston Edison Co. v. United States*, 80 Fed. Cl. 468 (2008)—in which he emphasized the importance of looking at the specific assignment language in a purchase agreement. In *Boston Edison*, the trial judge recognized the comprehensive nature of the assignment language in the agreements between Delmarva, ACE, and PSEG. *See Boston Edison*, 80 Fed. Cl. at 496 (discussing *Delmarva*, 79 Fed. Cl. at 216 and noting that ACE and Delmarva "had no cause of action after assigning their claims against the DOE"). Ultimately, *Rochester* and *Boston Edison* support PSEG's position that each case requires a fact-intensive review and, because of this, the resolution of this case will have little effect on other spent fuel cases currently pending.

volving competing claims by an assignor and assignee) that takings will go uncompensated. As occurred here, the Government will have the discretion (as it always has) to recognize an assigned takings claim and litigate with the assignee alone. No takings claim has been extinguished, just the assignors' ability to recover a share of any just compensation after they had bargained away these claims when they sold their minority interests in the nuclear plants.

The case law does not support ACE and Delmarva's characterization that the assignment of a takings claim is somehow unique and different from other assignments subject to the Assignment of Claims Act; or, that the Government's recognition of an assignment somehow extinguishes a right to just compensation. Regardless of the type of claim involved, the law allows the Government to recognize an assignment that fails to comply with the various technical requirements of the Act.

III. THIS CASE IS MOOT, BECAUSE ACE AND DELMARVA ARE NO LONGER THE REAL PARTIES IN INTEREST AND HAVE NO FURTHER CAUSE OF ACTION

While the Federal Circuit properly concluded that the Government could recognize ACE and Delmarva's assignment of their claims to PSEG, the Federal Circuit would have been equally justified in concluding that ACE and Delmarva no longer constitute the real parties in interest and have no further cause of action due to the assignment. The CFC, in fact, concluded that it lacked jurisdiction to invalidate the arbitration award. *See Delmarva I*, 79 Fed. Cl. at 210, 213, Cert App. at 27a-29a. Given this finding, coupled with Petitioners' withdrawal of their appeal chal-

lenging the confirmation of the arbitration award in the New Jersey courts, the instant appeal no longer states a viable cause of action. The appeal is moot.

Under Article III of the Constitution, this Court only has power to render a decision based on an actual case or controversy; and federal courts are not "'empowered to decide moot questions or abstract propositions . . . .'" *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (quoting *United States v. Alaska S.S. Co.*, 253 U.S. 113, 116 (1920)). A parallel proceeding in another court may render a case moot by deciding an issue central to the litigation. *See Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."); *see also* 15 JAMES WM. MOORE *ET AL.*, MOORE'S FEDERAL PRACTICE § 101.93[3], at 101-176.1 (3d ed. 2008) ("When pending litigation involves a legal issue that is later disposed of in another forum, the resolution of the issue or claim may render the pending lawsuit moot, provided that the resolution of the claim in the other forum is conclusive."); 13B CHARLES ALAN WRIGHT *ET AL.*, FEDERAL PRACTICE & PROCEDURE § 3533.2.1, at 825-26 (3d ed. 2008) ("Mootness may result from action by the same tribunal or another one that forecloses relief rather than grants it.").

Here, the arbitration decision conclusively determined that ACE and Delmarva have no right to bring the claims in the instant case based on their assignment of those claims to PSEG. This Court has noted that a state court can enforce the transfer of claims between parties even if the assignment violates the Assignment of Claims Act. *See Segal v. Rochelle*, 382 U.S. 375, 384-85 (1966). The arbitration decision has

been confirmed in New Jersey Superior Court and ACE and Delmarva withdrew their appeal, which makes it final.

The confirmation of the arbitration decision in New Jersey state court should be accorded full faith and credit by this Court under Article IV, Section 1 of the U.S. Constitution and its implementing statute, 28 U.S.C. § 1738. *See Migra v. Warren City Schl. Dist. Bd. of Ed.*, 465 U.S. 75, 81 (1984) ("It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered."); *Caldeira v. County of Kauai*, 866 F.2d 1175, 1178 (9th Cir. 1989) ("The state court's confirmation of the arbitration award constitutes a judicial proceeding for purposes of [28 U.S.C.] section 1738, and thus must be given the full faith and credit it would receive under state law."); *see also* 9 U.S.C. § 13(c) (2006) (an arbitration award confirmed in court "shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered"), PSEG App. at 75a. As between Petitioners and PSEG, Petitioners can no longer assert ownership of the claims and should be precluded from pursuing their claims. Ultimately, ACE and Delmarva are no longer the real parties in interest under Rule 17(a) of the Court of Federal Claims, which requires that "[e]very action shall be prosecuted in the name of the real party in interest." This case is moot, because ACE and Delmarva are no longer the real parties in

interest to pursue these claims and are precluded from asserting otherwise.[12]

Also, because ACE and Delmarva no longer own the claim, they no longer have a cause of action to pursue in the CFC. In another spent nuclear fuel case interpreting similar language in another purchase agreement for a nuclear station, the CFC concluded that the selling utility retained no claim and its case should be dismissed with prejudice. *Vt. Yankee Nuclear Power Corp. v. United States*, 84 Fed. Cl. 339, 340 (2008) ("Lacking any actionable claims that were not transferred to [the purchaser] in the sale of the Power Station, [the seller's] Complaint and First Amended Complaint are dismissed with prejudice."). The same conclusion applies here. ACE and Delmarva assigned their claims to PSEG and no longer have a cause of action to pursue (regardless of the effect of the Assignment of Claims Act). Even if this case were somehow returned to the CFC, the CFC will ultimately dismiss this case based on this alternative ground. Thus, this appeal is moot and ACE and Delmarva can receive no further relief.

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[12] Also, allowing ACE and Delmarva to continue their cases despite the arbitration decision would undermine the Federal Arbitration Act, 9 U.S.C. §§ 9 & 10, and the strong federal policy, which favors arbitration "to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Volt Info. Sciences, Inc. v. Bd. of Trs.*, 489 U.S. 468, 476 (1989). The Federal Arbitration Act limits review of arbitration decisions to the explicit grounds stated in the FAA and may not be expanded "to the point of evidentiary and legal review generally." *See Hall St. Assocs., LLC v. Mattel, Inc.*, 128 S. Ct. 1396, 1404 (2008). ACE and Delmarva's continued pursuit of their cases in the federal courts undermines the binding arbitration award and constitutes a naked attempt to forum shop and re-litigate the unfavorable decision of the arbitration panel, which decision was reviewed, affirmed, and is final for all purposes in New Jersey.

CONCLUSION

For the foregoing reasons, ACE and Delmarva's Cert Petition should be denied.

Respectfully submitted,

JAY E. SILBERG
Counsel of Record
ALEX D. TOMASZCZUK
DANIEL S. HERZFELD
PILLSBURY WINTHROP
SHAW PITTMAN LLP
2300 N Street, NW
Washington, DC 20037
(202) 663-8000

Counsel for Respondents
PSEG NUCLEAR, LLC AND
PUBLIC SERVICE ELECTRIC
AND GAS COMPANY

March 23, 2009

APPENDIX

APPENDIX A

IN THE MATTER OF THE ARBITRATION OF:

PSEG POWER LLC, and PSEG NUCLEAR LLC,
Claimants,

v.

PEPCO HOLDINGS, INC., ATLANTIC CITY ELECTRIC CO., and DELMARVA POWER AND LIGHT CO.,
Respondents.

ATLANTIC CITY ELECTRIC CO., and DELMARVA POWER AND LIGHT CO.,
Claimants,

v.

PSEG POWER LLC, and PSEG NUCLEAR LLC,
Respondents.

Opinion and Order

The parties have filed reciprocal arbitration demands seeking this Panel's consideration of whether PSEG Power LLC and PSEG Nuclear LLC (collectively, "PSEG") waived its right to arbitrate its claim that Atlantic City Electric Co. ("ACE") and Delmarva Power and Light Co. ("Delmarva," and, collectively with ACE, "ACE/Delmarva")[1] assigned Fifth-Amendment-based takings claims against the United States to PSEG, and, if not, whether such assignments were made. For the reasons outlined

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[1] Although PEPCO Holdings, Inc. ("PEPCO"), the parent of ACE and Delmarva, is named as a respondent in PSEG's demand, it is not a claimant in ACE/Delmarva's demand and apparently is not being represented by ACE/Delmarva's lawyers (according to the signature blocks on the briefs). Because there has been no attempt by PEPCO to object to the arbitration, it should be bound by this decision.

below, we find that PSEG did not waive or otherwise lose its right to arbitrate, and that the takings claims at issue were assigned to PSEG.

FACTS & PROCEDURAL POSTURE

The factual background is largely undisputed and is set forth in material part below.

I. SPENT NUCLEAR FUEL REGULATION

Spent nuclear fuel ("SNF") is fuel that has been withdrawn from a nuclear reactor following irradiation, the constituent elements of which have not been separated by reprocessing. 42 U.S.C. § 10101(23). Under the Nuclear Waste Policy Act of 1982 ("NWPA"), "the Federal Government has the responsibility to provide for the permanent disposal of . . . [SNF] as may be disposed of in order to protect the public health and safety and the environment." *Id.* § 10131(a)(4). However, "the costs of such disposal should be the responsibility of the generators and owners of such . . . [SNF]." *Id.*

Pursuant to the above mandate, the Department of Energy ("DOE") was tasked with constructing a facility for the long-term storage of SNF. *See id.* § 10131(b). In order to cover the costs of building and maintaining a facility to house SNF, among other materials, the NWPA authorized DOE "to enter into contracts with any person who generates or holds title to . . . [SNF] of domestic origin for the acceptance of title, subsequent transportation, and disposal of such waste or spent fuel." 42 U.S.C. § 10222(a)(1). Renewal of nuclear facilities' licenses to operate was conditioned on entering into such contracts. *Id.* § (b)(1)(A).

DOE adopted a form contract—the Standard Contract for Disposal of Spent Nuclear Fuel and/or High-

Level Radioactive Waste (the "Standard Contract" or "Contract")—that nuclear facilities were required to execute. 10 C.F.R. § 961.11. Under the Standard Contract, nuclear facilities pay a one-time fee for past nuclear energy production and a continuing fee for on-going production, *id.* art. VIII.B, and DOE was required to complete its storage facility by January 31, 1998. The nuclear facilities upheld their end of the bargain, but DOE did not. DOE projects that a federal storage facility will be available at the earliest by 2010, if then. 59 Fed. Reg. 27007, 27008 (May 25, 1994).

II. THE PURCHASE AGREEMENTS

On September 27, 1999, PSEG purchased ACE/Delmarva's minority interests in three facilities: Hope Creek Station ("Hope Creek"), Salem Station ("Salem") and Peach Bottom Station ("Peach Bottom," and, collectively with the other facilities, the "Facilities") pursuant to three purchase agreements (the "PAs").[2] *See* Opening Jurisdictional Brief of ACE/Delmarva at 2. PSEG also purchased the majority interests in Hope Creek and Salem from Public Service Electric & Gas Co. ("PSE&G").

The PAs define the Purchased Assets to include SNF. PAs § 2.1(c) (including Nuclear Materials, a term defined in § 1.1(91) to include SNF). Section 2.6 gives PSEG "all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the [DOE's] failure to take [SNF]."

Similarly, Section 2.1(l) includes in the purchased assets:

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[2] The PAs govern different facilities, but their substantive terms are identical. Opening Merits Br. of PSEG at 3.

> All claims of Seller [ACE/Delmarva] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims describe in Section 2.2(l).[3]

Section 2.1(m) adds:

> [t]he rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities, whether received as payment or credit against future liabilities, in each case, relating to any period prior to, on or after the Closing Date, other than the claims described in Section 2.2(m).[4]

PSEG also bargained for the right "exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related

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[3] The § 2.2(l) carve-out is for DOE refunds for decontamination and decommissioning costs.

[4] The § 2.2(m) carve-out is for particular litigations of no relevance here. The other Excluded Assets are also not pertinent to the present issues.

to any Purchased Assets or Assumed Liabilities . . . ." PAs § 2.5(b).

The PAs have a standard no-waiver clause, providing that "[t]he failure of a Party to this Agreement to assert any of its rights under this Agreement or otherwise shall not constitute a waiver of such rights." PAs § 10.5.

The PAs are governed by New Jersey law, PAs § 10.10, and provide for arbitration under the American Arbitration Association rules of "any dispute between Seller and Buyer . . . relating to or arising out of any provision of" the PAs, PAs § 8.6.

III. THE LITIGATIONS

The current arbitration concerns separate actions brought against DOE by PSEG and ACE/Delmarva, respectively. The first was brought by PSEG to recover for, among other things, DOE's breach under the Standard Contracts in failing to take SNF by 1998. Later, ACE/Delmarva sued DOE for failure to provide just compensation pursuant to the Fifth Amendment in exchange for the "taking" that resulted from its failure to take SNF.

A. PSEG's Suit Against DOE

PSEG filed its suit in the Court of Federal Clams ("CoFC") on September 26, 2001. That suit contains claims for breach of the Standard Contracts, for breach of the implied covenant of good faith and fair dealing, and to recover compensation for a taking. Sellers' Appendix ("SA"), Tab 2 at 8-11. The facts underlying all claims are that DOE promised to take SNF from Hope Creek and Salem Station, but failed to do so, and also kept the money paid to DOE under

the Standard Contracts.[5] On January 6, 2004, PSEG amended its complaint to add PSE&G as a plaintiff, presumably in case DOE argued that the takings claims were not transferable by PSE&G.

On January 31, 2005, the CoFC dismissed PSEG's breach of contract claims on jurisdictional grounds and stayed the remaining claims pending appeal. PSEG's Appendix ("PA") at A16. On November 20, 2006, some 22 months later, the Federal Circuit reversed the CoFC's jurisdictional ruling. PA at A37.

On January 5, 2007, DOE moved to consolidate PSEG's case with ACE/Delmarva's, and PSEG's case was subsequently stayed on PSEG's motion for stay pending completion of binding arbitration. PA at A46.

B. ACE/Delmarva's Suit Against DOE

On September 26, 2003, representatives of ACE/Delmarva met with representatives of PSEG to discuss

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[5] PSEG did not sue DOE with respect to Peach Bottom because its contract claims against the DOE were settled prior to the filing of the PSEG suit by Peach Bottom's majority owner Exelon. While the settlement was rejected by the Eleventh Circuit for certain reasons regarding the source of the funds, a subsequent settlement was reached after the rejection. Transcript of Arbitration Proceedings of May 24, 2007 ("Tr.") at 157:8-158:22. Counsel for ACE/Delmarva argued that the Peach Bottom settlement shows that the government is open to settling SNF contract claims without settling the takings claims. *Id.* at 107:24-108:6. But Counsel for PSEG responded that the government's current insistence that PSEG settle its contract claims with all associated takings claims comes from the government's experience in settling Peach Bottom, as, while it believed it was ending the entire matter with the settlement, it found itself facing takings claims notwithstanding the settlement. *Id.* at 135:18-136:14. Whether the government is willing to settle the SNF contract claims in the absence of the takings claims is not relevant here; we must simply decide who owns the takings claims.

ACE/Delmarva's intention to sue DOE based on takings claims that ACE/Delmarva believed it could bring arising from DOE's failure to take SNF from the Facilities. Opening Jurisdictional Br. of ACE/Delmarva at 3. PSEG asserted that any such lawsuit would contravene the PAs, as all claims were assigned to PSEG. *Id.* ACE/Delmarva apparently explained why it believed the takings claims were distinct from the assigned claims, and PSEG offered no response. *Id.* (citing Affidavit of Nicholas W. Mattia, at SA Tab 1 ¶¶ 4-10); *see also* Declaration of Harold W. Borden at A3-A5 in 2-8.

ACE and Delmarva filed separate takings actions in the CoFC on January 13, 2004. On December 2, 2004, both ACE and Delmarva added "protective" breach of contract and breach of the implied covenants of good faith and fair dealing claims (making the suits essentially identical to the PSEG suit). The ACE and Delmarva cases were consolidated on January 21, 2005. The CoFC denied DOE's motion for summary judgment in the consolidated case on July 1, 2005.

ACE/Delmarva then subpoenaed documents from PSEG on September 29, 2005. In response, on October 6, 2005, PSEG again asserted that ACE/Delmarva had no right to pursue the takings claims under the PAs and requested that those claims be voluntarily dismissed forthwith. Documents Relating to ACE/Delmarva–PSEG Arbitration ("Documents"), Tab II.C. PSEG also threatened to initiate arbitration under the PAs if ACE/Delmarva continued to press the takings claims. *Id.* ACE/Delmarva replied by letter (from an officer of Pepco Holdings, Inc.) that it would not dismiss those claims because it did not believe that they overlapped PSEG's claims and it did

not intend to and could not have transferred them in the PAs. Documents, Tab II.D. PSEG replied with a letter reiterating its position regarding assignment of the claims and another letter objecting to the subpoena. Documents, Tabs II.E & II.F.

ACE/Delmarva moved on January 12, 2006 to compel production. PSEG responded by again asserting that the takings claims did not belong to ACE/Delmarva in light of the PAs. The CoFC granted the motion to compel (without ruling on PSEG's assignment claims), SA, Tab 5; SA, Tab 8 at 7 (noting that the CoFC "has not addressed the issue of the impact of the assignment of claims directly"), and PSEG produced the requested documents.

On January 5, 2007, DOE moved to consolidate the ACE/Delmarva and PSEG cases. ACE/Delmarva opposed consolidation (as did PSEG). *See* PA at A43; Opening Jurisdictional Brief of PSEG, at 11; Tr. at 47:13-48:11. PSEG followed this with a Notice of Dispute under the PAs to ACE/Delmarva. Pursuant to the Notice of Dispute, on April 5, 2007, PSEG served ACE/Delmarva with the arbitration demand that resulted in this proceeding. ACE/Delmarva responded on April 16, 2007 with its own arbitration demand, which was superseded by an amended demand served April 23, 2007.

Judge Miller issued an order on April 12, 2007 denying in part without prejudice and granting in part[6] DOE's consolidation motion and stayed the case temporarily pending this arbitration. SA, Tab 8 at 2.

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[6] It is not clear what part of the motion was granted. *See* Tr. at 130:5-10.

C. The Arbitration Claims

PSEG's arbitration demand seeks declarations that: (1) ACE/Delmarva assigned all claims including the takings claims to PSEG under the PAs; (2) PSEG received the right to control all litigations concerning SNF including the takings claims under the PAs; (3) ACE/Delmarva breached the PAs by initiating the Delmarva litigation and by refusing to dismiss; (4) ACE/Delmarva breached the PAs by not giving PSEG pre-closing notice of the existence of the takings claims; (5) ACE/Delmarva breached the PAs by failing to attempt to secure the government's consent to assign the takings claims to PSEG; and (6) the PAs obligate ACE/Delmarva to assign to PSEG all earnings from the takings claims.

ACE/Delmarva's demand seeks: (1) consideration of ACE/Delmarva's claim that PSEG's Notice of Dispute and demand for arbitration are invalid; (2) a declaration that the Notice of Dispute and arbitration demand are barred by laches or contain claims not subject to arbitration; and (3) a dismissal of the claims set forth in PSEG's arbitration demand.

ANALYSIS

I. The Claims At Issue Are Arbitrable

ACE/Delmarva contends that the present dispute over whether it assigned the SNF takings claims to PSEG is beyond the scope of the arbitration clauses in the PAs. Opening Jurisdictional Br. of ACE/Delmarva at 18. Although ACE/Delmarva recognizes that the clauses are broad enough to encompass any dispute arising out of any provision of the PAs, it contends that, because the takings claims are not assignable and cannot provide PSEG with any benefit, they cannot arise out of any provision of the

PAs. *Id.* This argument is essentially a recasting of ACE/Delmarva's arguments as to why the claims were not assigned by the PAs. But it seems to us logical to the point of being tautological that, if the PAs confer on this Panel jurisdiction to decide whether certain claims ***were*** assigned, we must also have jurisdiction to decide whether the same claims ***were not*** assigned. ACE/Delmarva does not appear to contend that the Panel lacks jurisdiction over the former question, only over the latter. Accordingly, ACE/Delmarva's contention that the present disputes are beyond the scope of the arbitration clause is without merit.

II. PSEG'S CLAIMS HAVE NOT BEEN WAIVED

ACE/Delmarva's more serious objection to arbitrability is that PSEG lost its right to arbitrate this dispute due to its litigation conduct in the ACE/Delmarva case and its delay in bringing this arbitration. Initially, we must decide whether this question is more properly addressed by the CoFC.

A. This Panel May Resolve the Waiver/Laches/Estoppel Question

"The Arbitration Act establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." *Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24-25 (1983). ACE/Delmarva asserts that this general rule does not apply to its allegation here that PSEG waived arbitration through litigation conduct, relying principally on the Third Circuit's recent decision in *Ehleiter v. Grapetree Shores, Inc.*, 482

F.3d 207 (3d Cir. 2007), in which the court stated that it "has long decided questions of waiver based on litigation conduct instead of referring the issue to an arbitrator." *Id.* at 217.

Ehleiter and the cases discussed therein involve parties litigating before a particular court when one of those parties moves for a stay in order to arbitrate, and the other objects based on the movant's waiver of the arbitration right through litigation conduct. Those cases hold that, as is apparent, a court is both in a better position and more suited than arbitrators to determine whether the litigation conduct at issue evinces a waiver, and to control its own proceedings and address abuses of the judicial system. *See, e.g.*, *Ehleiter*, 482 F.3d at 218.

Here, on the other hand, the parties have not been litigating the merits of their cases before the same Judge, and there continues to be no court case to which both ACE/Delmarva and PSEG are parties. Indeed, ACE/Delmarva has opposed DOE's consolidation motions that would put both parties before the same Judge. Thus, no court is in any better position than this Panel to determine whether PSEG's litigation conduct waived its arbitration rights. Judge Miller, when given the opportunity to deny a stay in the ACE/Delmarva case based on PSEG's litigation conduct, declined to do so.[7] SA, Tab 7 at 8. Moreover,

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[7] ACE/Delmarva's assertion that Judge Miller "retained jurisdiction of [sic] the question whether [PSEG] by its delay and litigation conduct has waived the right to arbitrate," Opening Jurisdictional Br. of ACE/Delmarva at 11, is actually contradicted by the statement by the court upon which it relies. The court said that "should the arbitrators fail to consider delay in the arbitration proceeding, the court cautions [the] parties that it will address the issue." SA, Tab 7 at 8-9. This implies that

ACE/Delmarva itself submitted the litigation waiver issue to this Panel in its arbitration demand, and did not suggest that this Panel did not have jurisdiction to decide the issue until weeks later.[8]

In sum, we do not believe that *Ehleiter* stands for the proposition that only a court may decide issues of waiver of arbitrability based on litigation conduct. *See Ehleiter*, 482 F.3d at 221 ("[W]e hold that waiver of the right to arbitrate based on litigation conduct remains ***presumptively*** an issue for the court to decide. . . .") (emphasis added). This is especially true in a case, such as this, in which both parties have submitted the issue to arbitration and there is no single court before which both parties' litigation conduct took place. Accordingly, we have jurisdiction to consider ACE/Delmarva's litigation waiver defense to arbitration.

B. PSEG Did Not Forfeit its Right to Arbitration

ACE/Delmarva relies on three related theories to contend that PSEG forfeited its rights to arbitration: waiver through litigation conduct, laches and equita-

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this Panel can decide the issue, and if it does, then the court need not do so.

To the extent that ACE/Delmarva is contending that Judge Miller erred in granting the stay because she did not rule on the litigation conduct waiver question, that is an issue for the Federal Circuit, not this Panel.

[8] ACE/Delmarva's contention that it "can hardly [be] fault[ed] for the fact that the [*Ehleiter*] issue was raised on May 9th; *Ehleiter* was raised by the Panel at the outset of the prehearing conference," Responsive Jurisdictional Br. of ACE/Delmarva at 3, is puzzling. *Ehleiter* did not establish new law in the Third Circuit and ACE/Delmarva could have raised the issue before Judge Miller or in an answer to PSEG's arbitration demand.

ble estoppel. ACE/Delmarva has the burden of proving these defenses. *See Great Western Mortgage Corp. v. Peacock* 110 F.3d 222, 233 (3d Cir. 1997) ("Given the burden that Peacock bears in demonstrating waiver, and her lack of evidence in support of her assertions, we are satisfied that Great Western clearly preserved the right to refer Peacock's claim to arbitration. As we have stated, waiver is not to be lightly inferred.").

1. Waiver by Litigation Conduct

In order to show that PSEG waived its right to arbitrate the question whether the takings claims at issue were assigned under the PAs, ACE/Delmarva must show, among other things, that the conduct caused it prejudice. "'[P]rejudice is the touchstone for determining whether the right to arbitrate has been waived' by litigation conduct." *Ehleiter*, 482 F.3d at 222 (quoting *Hoxworth v. Blinder, Robinson & Co., Inc.*, 980 F.2d 912, 925 (3d Cir. 1992)). A "nonexclusive list of factors relevant to the prejudice inquiry" with respect to litigation conduct includes: "[1] the timeliness or lack thereof of a motion to arbitrate . . . [; 2] the degree to which the party seeking to compel arbitration [or to stay court proceedings pending arbitration] has contested the merits of its opponent's claims; [3] whether that party has informed its adversary of the intention to seek arbitration even if it has not yet filed a motion to stay the district court proceedings; [4] the extent of its non-merits motion practice; [5] its assent to the [trial] court's pretrial orders; and [6] the extent to which both parties have engaged in discovery." *Id.* at 222-23 (quoting *Hoxworth*, 980 F.2d at 926-27).

Here, the first factor—timeliness—is offset by the third—notice of intent to seek arbitration. Although

PSEG delayed in filing this arbitration after being on notice that ACE/Delmarva was litigating the takings claims, it made clear to ACE/Delmarva from the outset its objections and intention to arbitrate. The remaining factors are difficult to assess; PSEG's litigation conduct has not been as a party to ACE/Delmarva's suit, but rather as a third-party opposing a document subpoena in that case. Indeed, the factors listed above measure the ***voluntary*** actions in the litigation at issue by the party seeking arbitration. Such action is absent here. All of PSEG's actions taken in ACE/Delmarva's suit identified by ACE/Delmarva—"opposing amotion to compel discovery, later producing 38,500 pages of documents [under court order] and more recently responding to the Court's Order to Show Cause," Opening Jurisdictional Br. of ACE/Delmarva at 13—were involuntary. ACE/Delmarva has failed to carry its burden of showing that PSEG actively participated in the takings litigation so as to waive its right to arbitration of the present claims.

2. Laches And Equitable Estoppel

For ACE/Delmarva to prevail on the defense of laches, it must show both an unexplained and inexcusable delay by PSEG in asserting its rights, and resulting prejudice. *Mitchell v. Alfred Hofmann Inc.*, 48 N.J. Super. 396, 403 (App. Div. 1958); *see also Kepner-Tregoe, Inc. v. Executive Dev., Inc.*, 79 F. Supp. 2d 474, 487 (D.N.J. 1999).

ACE/Delmarva argues that PSEG delayed over three years in filing this arbitration after being given notice of ACE/Delmarva's intention to file takings claims, and also acquiesced in ACE/Delmarva's assertion of those claims by adding PSE&G to its own suit containing takings claims for Hope Creek and Salem.

However, the latter point suggests that PSEG agreed with ACE/Delmarva that PSEG itself might not be able to bring the takings claims—and has nothing to do with whether PSEG thought that the claims were assigned under the PAs.

There is no dispute that PSEG waited over three years from the filing of ACE/Delmarva's suit to file its dispute notice that initiated this arbitration. But ACE/Delmarva must show that this delay was inexplicable and unreasonable—that it "lull[ed] [it] into a false sense of security or belief that [PSEG] acquiesced in what [ACE/Delmarva] [was] doing." *Murphy v. Trapani*, 255 N.J. Super. 65, 75 (App. Div. 1992). It has not made this showing. PSEG objected repeatedly to ACE/Delmarva proceeding with the takings claim, based on the PAs' assignment of the claims and its rights to arbitrate over the objections. *See id.* (rejecting laches defense despite two-year delay in filing as plaintiffs immediately complained about defendants actions when they were taken); *see also King v. Innovation Books*, 976 F.2d 824, 832-33 (2d Cir. 1992) (rejecting laches when plaintiff had timely warned defendants of his claims). All of PSEG's actions were consistent with its belief that ACE/Delmarva assigned all of its rights to PSEG, including the takings claims.[9] ACE/Delmarva was on

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[9] The dissent points to a letter from PSEG to ACE/Delmarva dated April 20, 2005 in which PSEG stated that it "simply has no interest or desire to prosecute or defend" the sort of claims ACE/Delmarva was pressing in the ACE/Delmarva litigation, and suggests that statement is irreconcilable with PSEG's position here. We disagree. It is one thing to have no interest in pursuing a particular legal theory or claim, perhaps for strategic or valuation reasons, but quite another to yield to another the right to pursue that theory or claim. PSEG's April 20 letter suggests only the former, and its communications both before and

notice of PSEG's objections, and knew as well their basis in the clear language of the PAs discussed below. Nonetheless, it proceeded to litigate. If ACE/Delmarva wanted to resolve PSEG's stated objections sooner, it could have filed for arbitration. ACE/Delmarva's litigation was undertaken with a clear-eyed awareness of the risks, including the cost of legal fees.

We also observe that the PAs themselves plainly state that non-assertion of rights shall not be construed as a waiver of those rights. Although the prevailing view is that such clauses themselves may be waived by agreement or conduct, *see* 13 Williston on Contracts § 39:36 (4th ed. 2007 supp.), here PSEG's conduct was consistent with the non-waiver clause.

PSEG's delay in bringing an arbitration while its own claims before the CoFC were dismissed is perhaps understandable. During the period before its claims were resurrected, PSEG stood to gain little if anything from expending its efforts and money in arbitrating against ACE/Delmarva over claims it could not bring without DOE's consent. Accordingly, it was logical for PSEG to stand by during the pendency of its appeal after having already made its objections and their basis clear to ACE/Delmarva.

Because of PSEG's repeated assertions of its rights under the PAs and the PAs' non-waiver clause, we find on balance that PSEG's delay was not unreasonable and should not have led ACE/Delmarva to conclude that PSEG acquiesced in its takings suit; there-

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after the April 20 letter (orally in September 2003 and by a letter dated October 6, 2005) explicitly deny the latter.

fore we reject the laches defense.[10] For the same reasons, we reject ACE/Delmarva's equitable estoppel defense.

III. ACE/DELMARVA ASSIGNED THE TAKINGS CLAIMS TO PSEG

Having rejected ACE/Delmarva's jurisdictional and equitable defenses, we now reach the merits of the dispute—whether ACE/Delmarva assigned the takings claims to PSEG in the PAs.

A. The Takings Claims Are Clearly Covered by the Assignments in the PAs

Under the PAs, ACE/Delmarva assigned "[a]ll claims of Seller [ACE/Delmarva] relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) . . . and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets." PAs § 2.1(l). The PAs also grant PSEG "all rights of recovery from third parties

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[10] Although we do not reach the second element of laches—prejudice—we note in passing that ACE/Delmarva's proof of prejudice appears to be thinner than ACE/Delmarva suggests. ACE/Delmarva contended at argument that prejudice should be measured hypothetically, in that, had PSEG brought its arbitration claim in the fall of 2003, it likely would have included Peach Bottom and, had PSEG won, ACE/Delmarva never would have brought its suit at all. Tr. at 80:5-81:5. However, we believe that prejudice should be measured based on what actually happened. In other words, the proper question is, in light of the delay, what did ACE/Delmarva do that would be to its detriment if it now loses this arbitration. ACE/Delmarva is not contending that the Peach Bottom settlement was contrived in bad faith to rebut its prejudice argument here. Tr. at 107:8-10.

and the Department of Energy relating to, arising from or in connection with the [DOE's] failure to take [SNF]." *Id.* § 2.6. PSEG further received the right "exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets [which include SNF]." *Id.* § 2.5(b).

These broad assignments make no exceptions for particular kinds of claims, and the detailed Excluded Assets list in the PAs make no mention of any takings claims. *See* PAs § 2.2. It is hard to imagine a more comprehensive assignment of claims. On their face, the PAs leave no doubt that the takings claims at issue here were assigned to PSEG and that PSEG received the exclusive right to control the litigation over the claims.

In the face of this unmistakable language, ACE/Delmarva makes two principal arguments as to why the takings claims were not assigned: (1) they arise independent of the Standard Contract, and (2) they could not have been assigned as a matter of law.

The first argument ignores the second half of § 2.1(l), which goes beyond claims arising out of the Standard Contract and covers "all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets," as well as § 2.6, which confers to PSEG "all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel." The Purchased Assets explicitly include SNF, and the takings claims indisputably arise out of or are in connection with DOE's failure to take SNF. Accordingly, it is irrelevant whether the takings claims arise from the Standard Contract or

from some other source—in either case, they are covered by the PAs assignment clauses."[11]

As to the second argument, ACE/Delmarva contends that the Assignment of Claims Act (or Anti-Assignment Act)[12] bars an assignment of the claims and, alternatively, that takings claims are "personal" and cannot be assigned in any event.[13] We need not

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[11] We note that, while ACE/Delmarva quotes Judge Miller's opinion denying summary judgment in stating that "[t]he court also noted that Sellers' takings claim 'is not predicated upon any rights emanating from the Standard Contract,'" Opening Jurisdictional Br. of ACE/Delmarva at 5, this is a distortion of the actual statement. The opinion was simply describing another opinion in stating that a takings claim ***might*** be viable "***insofar*** as the takings claim is not predicated upon any rights emanating from the Standard Contract." SA, Tab 4 at 4 (emphasis added). This is hardly an actual finding that the claim does not arise from the rights in the Standard Contract. Indeed, the very opinion that Judge Miller was describing—*Boston Edison Co. v. United States*, 64 Fed. Cl. 167 (2005)—found that, if both a takings claims and a contract claim simultaneously existed, the contract claim would provide the preferable basis for recovery. *Id.* at 187; *cf. Slack v. McDaniel*, 529 U.S. 473, 485 (2000) ("[T]he 'Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .'") (quoting *Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring)).

[12] While ACE/Delmarva points out that the Assignment of Claims Act, 31 U.S.C. § 3727 is different from the Anti-Assignment Act, 41 U.S.C. § 15, courts have often referred to the Assignment of Claims Act as the Anti-Assignment Act (for obvious reasons) and we use the terms interchangeably to refer to the former statute.

[13] To the extent that ACE/Delmarva's position is that the anti-assignment statute should be considered by the Panel in determining whether ACE/Delmarva ***intended*** to assign the takings claims, it must be rejected. The PAs are unambiguous

dwell on the latter point, as ACE/Delmarva offers no authority in support of it nor any rationale to distinguish takings claims from any other claim with respect to assignability.[14]

The Anti-Assignment Act argument fails for two independent reasons: (1) the Act is not absolute, and therefore cannot render an assignment void *ab initio*, and (2) the Act may not be invoked by a party other than the United States.

It is undisputed that the government may consent to an assignment of a claim that would otherwise violate the Anti-Assignment Act. *See, e.g., Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 240 (2006) ("The prohibitions of the Anti-Assignment Acts notwithstanding, 'assigned contracts are valid when the assignment takes place by operation of law, or when the government consents to and recognizes the assignment.'") (quoting *Rochester Gas and Elec. Corp. v. United States*, 65 Fed. Cl. 431, 437 (2005)). Accordingly, ACE/Delmarva's contention that it could not have assigned the takings claims at issue rings

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on this point, and therefore intent is irrelevant. Counsel for ACE/Delmarva recognized as much at argument, and it appears that the parties have agreed that the PAs are unambiguous and are not presenting evidence as to intent. *See, e.g.*, Tr. at 21:12-17; 109:20-110:18; 140:14-17.

[14] ACE/Delmarva's argument is essentially that the claims are *per se* unassignable because the buyer of such a claim would be doubly benefiting—both from the depreciated value of the subject of the sale and from the takings claim. But this presupposes that none of the purchase price is attributable to the claim itself. Because that assumption is not a necessary one, ACE/Delmarva's justification for the assignment bar is unconvincing. Even if the assumption were correct, it could simply reflect the parties' views of the merits of the claim at the time the PA's were executed.

hollow; although it may be true that the government generally would not agree to such an assignment, that does not change the fact that it is at least possible for the assignment to take place.

Moreover, even if the Anti-Assignment Act does bar PSEG from asserting the claim, that Act may not be invoked by ACE/Delmarva to void the assignment. "The Anti-Assignment Act is for the government's protection and only the United States may assert it." *United States v. Certain Space in Property Known as Chimes Bldg.*, 320 F. Supp. 491, 496 (N.D.N.Y. 1970), *aff'd*, 435 F.2d 872 (2d Cir. 1970). While "[a]n invalid attempted assignment does not forfeit the claim [(]it leaves it as it was before the purported assignment[),] . . . the assignment remains enforceable as between the parties to the assignment." *Saint John Marine Co. v. United States*, 92 F.3d 39, 45 (2d Cir. 1996); *see also* 91 Sonja Larsen *et al.*, Corpus Juris Secundum: United States § 196 ("[T]he invalidity of the assignment will not enable the assignor to recover from the United States after it has paid the claim to the assignee."). ACE/Delmarva does not point to any cases in which the Act has been used to invalidate an assignment as between private parties.

ACE/Delmarva argues that it must be able to bring the takings claims if PSEG may not bring them. Assuming that DOE would not consent to the assignment and that PSEG may not bring the takings claims, ACE/Delmarva's argument still relies on the incorrect assumption that some party has to be able to bring the claims. Indeed, ACE/Delmarva goes so far as suggesting that it would be ***unconstitutional*** for a governmental taking to go uncompensated. *See, e.g.*, Responsive Merits Br. of ACE/Delmarva at 2-3. That is simply an overstatement. Indeed, if the fail-

ure to take SNF actually does constitute a taking, it could go uncompensated if neither ACE/Delmarva nor PSEG actually sought compensation from DOE. It is not reasonable to interpret the Anti-Assignment Act, which exists solely to protect the government, to force the government to answer for claims against it.

In sum, we find that the PAs' comprehensive assignment language included the takings claims at issue and that the Assignment of Claims Act does not alter that conclusion or void the assignment as between ACE/Delmarva and PSEG. Accordingly, PSEG was assigned both the claims themselves and the right to control litigation over them.

B. ACE/Delmarva's Judicial Estoppel Argument Is Without Merit

ACE/Delmarva contends that PSEG's "pursu[it] [of] a sellers takings claim on behalf of one of its sellers [PSE&G]" is flatly inconsistent with its position that ACE/Delmarva has no right to pursue its takings claim. This argument suffers from multiple weaknesses.

The doctrine of judicial estoppel bars a party from asserting a position contrary to a position that the party has successfully asserted in previous litigation. *Murray v. Silberstein*, 882 F.2d 61, 66 (3d Cir. 1989); *Wein v. Morris*, 388 N.J. Super. 640, 658 n8 (App. Div. 2006). Here, the allegedly inconsistent positions identified by ACE/Delmarva are not in fact inconsistent at all. PSEG is not asserting in this proceeding that the takings claims at issue are not legitimate; it is asserting that they were assigned under the PAs. Moreover, PSEG has not prevailed on any position with respect to this claim, and therefore cannot be judicially estopped.

IV. ACE'S WINDFALL ARGUMENTS CANNOT OVERCOME THE PLAIN LANGUAGE OF THE PAS

The theme behind ACE/Delmarva's arguments on the merits is that a finding that PSEG acquired the takings claims would lead to a windfall in favor of PSEG. As the argument goes, ACE/Delmarva sold its interests in the plants for less than they were worth because of DOE's failure to take SNF, and, if PSEG may assert the claims for this diminished value, it is recovering twice for the value—once in the discount and again in the recovery. Whatever rhetorical force this argument may have, it does not give the Panel license to rewrite the PAs, which plainly state (multiple times) that all claims relating to SNF are assigned to PSEG. *See generally St. Pius X House of Retreats, Salvatorian Fathers v. Diocese of Camden*, 88 N.J. 571 (1982).

Moreover, ACE/Delmarva and, as importantly, the Board of Public Utilities, thought ACE/Delmarva was getting fair value for the facilities regardless of any takings claims. *See* PA at A108-A133. In explaining its findings, the Board of Public Utilities noted, in particular, the major risks that PSEG assumed under the PAs for the "operational risks of the units" which were "particularly significant" because the facilities "have historically experienced substantial performance and cost uncertainty," and also for "all of the responsibility and risk associated with unforeseen escalation in the cost of decommissioning of the plant." PA at A20. The amount of the liabilities assumed by PSEG under the PAs remains uncertain. It is also uncertain whether the takings theory under which the claims are being brought will prove to be viable and to what extent ACE/Delmarva would be able to show any significant loss as a minority owner. Fur-

ther, assuming the sellers were able to proceed with the takings claims, it is unclear whether and to what extent any takings damages would remain for the sellers in these cases after the buyer's contract claims were resolved. *See Boston Edison*, 64 Fed. Cl. at 187. Thus, the idea that recognition of ACE/Delmarva's assignment to PSEG of the takings claims is against the public interest is speculative and may also be exaggerated. It appears that ACE/Delmarva is asking this Panel to ignore the deal reached in the PAs and the Board of Public Utilities' findings and apply the medieval doctrine of the just price. We cannot do so, and, to the extent that the doctrine could possibly be applied here, *cf. In re Busy Beaver Bldg. Centers, Inc.*, 19 F.3d 833, 854 n.32 (3d Cir. 1994) ("[I]t is not the function of judges in fee litigation to determine the equivalent of the medieval just price.") (quoting *In re Continental Ill. Sec. Litig.*, 962 F.2d 566, 568 (7th Cir. 1992) (Posner, J.), it already has been applied by the Board of Public Utilities.

* * *

We find that ACE/Delmarva assigned the takings claims at issue here to PSEG, and that ACE/Delmarva's initiation of its takings litigation and its refusal to dismiss that litigation breached the PAs. Accordingly, PSEG's other claims regarding (1) ACE/Delmarva's failure to give notice of the takings claims; (2) ACE/Delmarva's failure to make efforts to assign the claims; and (3) assignment by ACE/Delmarva to PSEG of the proceeds of the ACE/Delmarva takings case are moot.

/s/ Michael Mukasey
C. Michael Loftus

Dated: June 20, 2007

SEPARATE OPINION OF JOHN D. ALDOCK

I respectfully dissent. In my opinion PSEG's more than three-year delay in bringing this arbitration was inexcusable and the more than $3.5 million in legal and expert fees and other company resources expended in litigating those claims over that period constituted substantial prejudice.[15] I would find that PSEG has forfeited its claim to arbitration through litigation conduct and laches.

ACE/Delmarva filed suit against the U.S. Government on January 14, 2005. PSEG issued its arbitration demand on April 5, 2007. While PSEG disputed ACE/Delmarva's right to bring its suit against the Government I believe it was incumbent on PSEG to do more.[16] I do not believe the burden was on ACE/Delmarva to initiate an arbitration solely to determine its right to litigate against the U.S. Government

Moreover, I find PSEG's letter of April 20, 2005 to counsel for ACE/Delmarva and the U.S. Government difficult to reconcile with its position in this arbitration. In that letter PSEG asked that Judge Miller be advised as follows: "PSEG Nuclear understands that

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[15] While PSEG speculates that ACE/Delmarva may have brought the Peach Bottom claim even if the other claims had been assigned, I do not believe hindsight speculation on that point removes the substantial prejudice ACE/Delmarva have incurred in litigating these claims against the U.S. Government for more than three years.

[16] I do not see PSEG's inaction during the period while its claim against the Government was dismissed as a justification for delay. Judge Miller clearly treated that dismissal as temporary and urged the parties to do the same. (*See* April 7, 2005 Hearing transcript at p. 23 attached to PSEG's prehearing brief.)

Delmarva is pursuing various legal theories, such as diminution in value, which PSEG Nuclear simply has no interest or desire to prosecute or defend. PSEG Nuclear is also opposed to consolidating its pending case, No. 01-551C (J. Futey), with the Delmarva case because the cases are in completely different procedural postures." (April 20, 2005 letter from Alex D. Tomaszczuk to Richard J. Conway and Harold D. Lester.)

PSEG apparently had no interest in the ACE/Delmarva claims against the Government until the Government conditioned settlement of PSEG's separate claims against the Government on settlement or extinguishment of the ACE/Delmarva claims (PSEG's Arbitration Demand at pp. 2 and 3). While this may in part explain PSEG's delay I do not believe it justifies it.[17]

Finally, I believe that Judge Miller, who has presided over the ACE/Delmarva litigation against the U.S. Government for more than three years, and who has pending a renewed motion for consolidation of the PSEG case against the Government, is in a better position than this panel to evaluate the waiver/laches/prejudice arguments. *See Ehleiter v. Grapetree Shares, Inc.*, 482 F.3d 207 (3d Cir. 2007).

/s/ John D. Alcock

Dated: June 20, 2007

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[17] Whether PSEG had no interest in the ACE/Delmarva claims because it believed them to be without merit, or because it could not benefit from claims that ACE/Delmarva was bringing on behalf of state rate payers is not material. PSEG clearly had no interest in the claims at issue here other than as a chip in its negotiations of its separate claims against the U.S. Government.

APPENDIX B

SUPERIOR COURT OF NEW JERSEY
MERCER COUNTY
CHANCERY DIVISION – GENERAL EQUITY

[Filed Dec. 19, 2007]

Docket No. C-59-07

PSE&G POWER, LLC, and PSE&G NUCLEAR, LLC,
Plaintiffs,

v.

ATLANTIC CITY ELECTRIC CO. and
DELMARVA POWER and LIGHT CO.
Defendants.

ORDER

This matter having been opened to the Court by way of an Order to Show Cause seeking to confirm the arbitration award entered by the arbitration panel on June 20, 2007 pursuant to *N.J.S.A.* 2A:23B-22 filed by Plaintiffs; and opposition having been filed by Defendants; and the Court having reviewed the submissions of the parties; and having heard oral argument on November 13, 2007; and for the reasons set forth in the Statement of Reasons attached; and for good cause having been shown;

IT IS ON THIS 19th DAY OF DECEMBER, 2007,

ORDERED that the Order to Show Cause filed by Plaintiffs seeking to confirm the arbitration award rendered on June 20, 2007 pursuant to *N.J.S.A.* 2A:23B-22 is GRANTED and JUDGMENT is entered accordingly in favor of Plaintiffs.

/s/ Neil H. Shuster, P.J., Ch.

PSEG POWER, LLC and PSEG NUCLEAR, LLC

v.

ATLANTIC CITY ELECTRIC CO. and
DELMARVA POWER & LIGHT CO.

Docket No. C-59-07

PLAINTIFFS' REQUEST FOR THE ISSUANCE OF AN ORDER TO SHOW CAUSE SEEKING RELIEF BY WAY OF SUMMARY ACTION

This matter arises from a verified complaint and order to show cause to proceed summarily filed on June 25, 2007 by PSEG Power, LLC and PSEG Nuclear, LLC ("Plaintiffs") against Atlantic City Electric Company ("ACE") and Delmarva Power and Light Company ("Delmarva") (collectively "Defendants") seeking to confirm an arbitration award entered on June 20, 2007. On July 2, 2007, the Court signed Plaintiffs' order to show cause to proceed summarily to confirm the arbitration award. On July 11, 2007, Defendants filed a cross-motion to stay Plaintiffs' order to show cause pending the outcome of a motion by Defendants before the United States Court of Federal Claims ("Court of Federal Claims") to vacate the June 20, 2007 arbitration award. On July 24, 2007, Defendants filed an answer counterclaim and affirmative defenses. On August 20, 2007, this Court denied Defendants' motion for the entry of a stay of all proceedings in this matter. On August 30, 2007, the Court of Federal Claims denied Defendants' request to vacate the arbitration award, on the grounds that it lacked jurisdiction to entertain the issue. On September 18, 2007, this Court set oral

argument on Plaintiffs' order to show cause for October 15, 2007, later rescheduled to November 13, 2007. On November 13, 2007, the Court of Federal Claims granted summary judgment for the United States against Defendants on the issue of whether Defendants had takings claims they could bring against the United States. Oral argument on Plaintiffs' application seeking to confirm the arbitration award took place on November 13, 2007; however, the decision by the Court of Federal Claims issued on November 13, 2007 was not known to this Court or to the parties at the time of oral argument.

The facts reveal that Plaintiffs are the operator and sole owner of the Hope Creek Nuclear Generating Station ("Hope Creek") and the operator and majority owner of the Salem Nuclear Generating Station ("Salem") (collectively the "Stations"). On or around September 27, 1999, Plaintiffs purchased the minority interests of Defendants in those stations pursuant to purchase agreements (the "Agreements"). According to Plaintiffs, the Agreements provide that Defendants were to sell Plaintiffs their entire minority interests in the Stations[1] including all claims related to the assets being sold. Plaintiffs also assert that the Agreements give Plaintiffs the exclusive control over any litigation related to any of the assets being sold, as well as assigning to Plaintiffs the right of recovery associated with such litigation.

Specifically, Section 2.1 of the Agreements provides those assets to be transferred as a part of the sale of the Stations, and states, in pertinent part:

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[1] According to Plaintiffs, at the time of the sale, ACE owned 7.41% of Salem and 5% of Hope Creek and Delmarva owned 7.41% of Salem.

> Upon the terms and subject to the conditions set forth in this Agreement, at the Closing, Seller shall sell, assign, convey, transfer and deliver to Buyer, and Buyer shall purchase, assume and acquire from Seller . . . those assets listed below, each as in existence on the Closing Date (collectively the "Purchased Assets"):
>
> (l) All claims of Seller relating to or pertaining to the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets. . .
>
> (m) The rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities.

Additionally, Section 2.5 of the Agreements covers the control of litigation and provides that Plaintiffs "shall be entitled exclusively to control, defend and settle any suit, action or proceeding and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities . . ." *See* Cert. of Christopher J. McAuliffe, Exh. A.

The Agreements also contain an arbitration clause and a provision stating the proper forum to hear any disputes arising out of the subject matter of the Agreements. Specifically, Section 8.3 of the Agreements, entitled "Arbitration," provides, in pertinent part:

> (a) Notwithstanding any provision hereof to the contrary, in the event of any dispute between Seller and Buyer arising after the Closing . . . and relating to or arising out of any provision of this Agreement . . . the sole remedy available to either Party is the dispute resolution process set forth in this Section 8.3.
>
> (b) The chief executive officers . . . of each of the Parties shall meet at a mutually acceptable time and place to attempt to settle any dispute in good faith.
>
> (c) In the event that (i) a meeting has been held in accordance with Section 8.3(b) and (ii) any such dispute of the kind referred to in Section 8.3(a) shall have not been resolved at such meeting, then, upon the written request of any Party, the Parties shall submit such dispute to binding arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. The decision, judgment and order of the arbitration tribunal shall be final, binding and conclusive as to the Parties involved in such dispute, and their respective Representatives, and may be entered in [a] court of competent jurisdiction.

Section 10.10 of the Agreements provides some guidance as to the "court of competent jurisdiction." Specifically, it provides, in pertinent part:

> This Agreement shall be governed by and construed in accordance with the laws of the State of New Jersey . . . as to all matters, including validity, construction, effect, performance and remedies. Venue in any and all suits, actions and proceedings related to the subject matter of this Agreement shall be in the state and federal courts located in and for the State of New Jersey (the "Courts") which shall have exclusive jurisdiction for such purpose, and the Parties hereby irrevocably submit to the exclusive jurisdiction of such Courts and irrevocably waive the defense of an inconvenient forum to the maintenance of any such suit, action or proceeding.

The current litigation arises out of separate actions filed by both Plaintiffs and Defendants against the Department of Energy ("DOE") in the Court of Federal Claims. In 1982, Congress passed the Nuclear Waste Policy Act which authorized the DOE to enter into contracts with utilities to accept title to, transport and dispose of spent nuclear fuel ("SNF"). The DOE subsequently created a standard contract that required it to commence acceptance of SNF no later than January 31, 1998 in exchange for a one time fee for SNF generated prior to 1983 and an ongoing fee assessed by the DOE for SNF generated thereafter. However, according to Plaintiffs, the DOE failed to meet its obligations to begin removing SNF and may not start this performance until the year 2017 at the earliest. Because of this delay, utilities that own and operate nuclear generating stations have been required to incur substantial costs for being forced to continue to store SNF. In this case, Plaintiffs entered into contracts with the DOE for the removal of SNF from the Stations. The DOE has

failed to do so, and in 2004, Plaintiffs filed suit against the United States for breach of contract in the Court of Federal Claims.

Defendants also filed claims against the United States in January 2004 seeking just compensation for the taking of private property by the federal government under the Takings Clause of the Fifth Amendment. The takings claims arose from the DOE's failure to remove SNF from the Stations which, at the time, were owned in part by Defendants. Defendants sought the losses they suffered prior to the sale of the Stations to Plaintiffs under the Agreements, which Defendants allege includes a substantially reduced sale price for the sold interests. The Court of Federal Claims initially denied the DOE's motion for summary judgment on Defendants' takings claim originally filed on April 28, 2005, and had granted another motion by Defendants seeking to subpoena documents from Plaintiffs. Plaintiffs have asked Defendants to dismiss their litigation because in Plaintiffs' suit against the DOE, the DOE stated that any recovery by Defendants in their litigation must directly offset any recovery by Plaintiffs in their litigation. The DOE also informed Plaintiffs that it will not settle its litigation with Plaintiffs without also resolving the claims advanced in Defendants' litigation. Because Defendants refused to dismiss their litigation, Plaintiffs triggered the dispute resolution procedures in Section 8.3. However, these procedures failed to resolve the dispute between the parties.

As a result, Plaintiffs subsequently filed an arbitration demand on April 5, 2007, essentially seeking a declaration that, under the Agreements, Defendants assigned to Plaintiffs all rights in the Purchased

Assets, including all claims related to the DOE's failure to remove SNF (including the takings claims), that Plaintiffs hold the right to control any litigation concerning the failure to remove SNF, and that Defendants are required to dismiss their litigation at Plaintiffs' request. In response, on April 16, 2007, Defendants filed their own separate arbitration demand. On April 23, 2007, Defendants filed an amended arbitration demand which sought to invalidate Plaintiffs' arbitration demand, a declaration that Plaintiffs' claims were not subject to arbitration, and a dismissal of Plaintiffs' arbitration claims.

On June 20, 2007, the arbitration panel in a 2-1 decision entered an award in favor of Plaintiffs. The majority opinion stated that the dispute was arbitrable, and held that the Agreements' comprehensive assignment language included the takings claims at issue; accordingly, Plaintiffs were assigned both the claims themselves and the right to control litigation over them. Additionally, it found that Defendants' refusal to dismiss their litigation against the United States in the Court of Federal Claims violated the Agreements. The separate opinion of Arbitrator John D. Aldock stated that Plaintiffs forfeited their claim to arbitration through litigation conduct and under the doctrine of laches, but additionally, that the Court of Federal Claims was in a better position to address these arguments. *See* Verified Complaint, Exh. 4. Pursuant to Section 10.10 of the Agreements, Plaintiffs then filed their verified complaint and order to show cause seeking the confirmation of the June 20, 2007 arbitration award on June 25, 2007.

On July 2, 2007, the same day that the Court signed Plaintiffs' order to show cause to proceed summarily to confirm the arbitration award, Defen-

dants filed a motion to vacate the arbitration ruling in the Court of Federal Claims. On July 11, 2007, Defendants filed a cross-motion in this Court to stay Plaintiffs' order to show cause pending the outcome of this motion to vacate the arbitration ruling. On July 24, 2007, Defendants filed an answer, counterclaim and affirmative defenses in response to Plaintiffs' verified complaint.

On August 20, 2007, this Court denied Defendants' motion for the entry of a stay of all proceedings in this matter. This Court denied the motion because it found that the Court of Federal Claims is not the appropriate jurisdiction to entertain Defendants' motion to vacate. This Court stated that the Court of Federal Claims has the power to only hear claims against the United States for monetary relief. This Court found instead that Defendants' motion to vacate should be heard as part of this state court proceeding. On August 30, 2007, the Court of Federal Claims found that it lacked jurisdiction to vacate an arbitration award. However, the Court of Federal Claims requested supplemental briefing on several issues in light of the United States' acceptance of Defendants' assignment of claims to Plaintiffs. The United States had filed a notice on August 22, 2007 stating that the Government had:

> accepted the assignment of those claims that [Defendants] purported to make to PSEG Nuclear, to the extent that we have been made aware of those claims through [Defendants'] complaint in this action and through the assignment provisions in the purchase and sale agreements that have been included in the appendices to some of the briefing in this case.

On November 13, 2007, the Court of Federal Claims ruled on Defendants' motion to vacate the June 20, 2007 arbitration award and on the United States' renewed motion for summary judgment. It reiterated that it would deny Defendants' motion to vacate the arbitration award because it lacked jurisdiction over disputes between private parties. Furthermore, and perhaps more importantly, it granted the United States' summary judgment motion against Defendants. Specifically, the Court of Federal Claims found that the United States had expressly consented to the assignment of claims from Defendants to Plaintiffs, and this acceptance vitiated the provisions of the Assignment of Claims Act that otherwise would have barred Defendants' assignment of claims against the United States to Plaintiffs. Therefore, because Defendants had assigned all of their claims against the United States related to the failure to remove SNF to Plaintiffs, the Court of Federal Claims granted summary judgment against Defendants in favor of the United States.

In the motion presently before the Court, Plaintiffs argue that the June 20, 2007 arbitration award should be confirmed because of New Jersey's strong public policy in support of arbitration as a method of resolving disputes. Additionally, Plaintiffs maintain that there is no evidence of any impropriety, wrongdoing, or significant mistakes in the arbitration process and order that would justify the correction, modification or vacation of the award. Defendants contend that the Court should not confirm the award because the award exceeded the arbitrators' powers, the arbitrators refused to consider pertinent evidence, and the arbitration concerned a question for which there was no agreement to arbitrate. Additionally, Defendants argue that the award exhibited a

manifest disregard of relevant law and therefore must be vacated.

The issue before the Court is whether to confirm the June 20, 2007 arbitration award. The Court will first discuss whether it is appropriate for Plaintiffs to have brought this action as a summary proceeding. *R.* 4:67-1 governs summary actions and provides that a summary action may be bought where the court is permitted by rule or by statute to proceed in a summary manner. *R.* 4:67-2 provides that those litigants proceeding summarily shall proceed by filing a verified complaint with an order to show cause.

Plaintiffs seek to move summarily under *N.J.S.A.* 2A:23B-22, entitled "Confirmation of Award," which provides:

> After a party to an arbitration proceeding receives notice of an award, the party may file a summary action with the court for an order confirming the award, at which time the court shall issue a confirming order unless the award is modified or corrected pursuant to section 20 or 24 of this act or is vacated pursuant to section 23 of this act.

Hence, it is clear that Plaintiffs may bring this action as an order to show cause seeking to proceed summarily.

Next the Court must determine whether it should analyze the validity of the arbitration award under federal or state law. There is a strong federal policy in favor of arbitration and arbitrators' decisions. Congress enacted the Federal Arbitration Act ("FAA"), also known as the United States Arbitration Act, in 1925 to abrogate the then-existing common law rule disfavoring arbitration agreements "and to

place arbitration agreements upon the same footing as other contracts." *Martindale v. Sandvik, Inc.*, 173 N.J. 76, 83-84 (2002) (quoting *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)). Section 2 of the FAA provides that it applies to all contracts involving interstate commerce. *See* 9 U.S.C. 2. In enacting Section 2, "Congress declared a national policy favoring arbitration and withdrew the power of the states to require a judicial forum for the resolution of claims which the contracting parties agreed to resolve by arbitration." *Martindale*, *supra*, at 84 (quoting *Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984)).

Section 10 of the FAA provides the grounds upon which a court may vacate an arbitration award:

> (1) where the award was procured by corruption, fraud, or undue means;
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
>
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
>
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made

See 9 U.S.C. 10.

Additionally, under federal law, as a matter of last resort, an arbitration award may be vacated if it evidences a manifest disregard for law. *St. John's*

Mercy Med. Ctr. v. Delfino, 414 F.3d 882, 884, 884 n.1 (8th Cir. 2005) (citing *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004)). It must be emphasized however that this doctrine is "extremely narrow," and should be reserved only for "those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent, but where none of the provisions of the FAA apply." *Ibid.* Put another way, a successful challenge to an arbitration award, apart from 9 U.S.C. 10, depends upon the challenger's ability to show that the award is "(1) unfounded in reason and fact; (2) based on reasoning so palpably faulty that no judge, or group of judges, ever could conceivably have made such a ruling; or (3) mistakenly based on a crucial assumption that is concededly a non-fact." *Advest. Inc. v. McCarthy*, 914 F.2d 6, 8-9 (1st Cir. 1990) (quoting *Local 1445, United Food and Commercial Workers v. Stop & Shop Cos.*, 776 F.2d 19, 21 (1st Cir. 1985)).

New Jersey shares this strong public policy favoring arbitration as a means to resolve disputes. It is a well-accepted principle that New Jersey supports the settlement of disputes by arbitration. *Singer v. Commodities Corp.*, 292 N.J. Super. 391, 400 (App. Div. 1996). *See also Stigliano v. Saint Rose High School*, 198 N.J. Super. 520, 529 (App. Div 1984) (stating that New Jersey courts have long favored the settlement of disputes by arbitration). Under the New Jersey Arbitration Act ("NJAA"), pursuant to *N.J.S.A.* 2A:23B-23(a), a court shall vacate an arbitration award under any of the following circumstances:

> (1) the award was procured by corruption, fraud, or other undue means;
>
> (2) the court finds evident partiality by an arbitrator; corruption by an arbitrator; or mis-

conduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(3) an arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to section 15 of this act, so as to substantially prejudice the rights of a party to the arbitration proceeding;

(4) an arbitrator exceeded the arbitrator's powers;

(5) there was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection pursuant to subsection c. of section 15 of this act not later than the beginning of the arbitration hearing; or

(6) the arbitration was conducted without proper notice of the initiation of an arbitration as required in section 9 of this act so as to substantially prejudice the rights of a party to the arbitration proceeding.

Usually, however, the FAA preempts state laws concerning arbitration agreements. It is firmly established that the FAA preempts state laws that invalidate arbitration agreements. *Martindale*, *supra*, at 85. *See also B & S Ltd. Inc. v. Elephant & Castle Int'l, Inc.*, 388 N.J. Super. 160, 172 (Ch. Div. 2006) (quoting *Doctor's Assocs., Inc. v. Hamilton*, 150 F.3d 157, 162 (2d Cir. 1998)) (stating that the "Supreme Court has declared that the FAA preempts all state laws that impermissibly burden arbitration agreements"). Nothing in the FAA indicates the broad principle of enforceability of arbitration agreements is subject to any additional limitations under state

law. *B & S Ltd*, *supra*, at 172 (citing *Southland Corp.*, *supra*, at 11).

However, the FAA's preemption does not completely encompass state laws. The FAA specifically permits states to regulate contracts, including contracts containing arbitration agreements under general contract principles; therefore, an arbitration clause may be invalidated upon such grounds as exist at law or in equity for the revocation of any contract. *Martindale*, *supra*, at 85. Nor does the FAA always preempt state laws. The FAA, while possessing some preemptive force, does not entirely displace state arbitration law, and will be found to be preemptive only when state law prevents parties from fully arbitrating their disputes. *Del Piano v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 372 N.J. Super. 503, 508-09 (App. Div. 2004). *See also ASW Allstate Painting & Constr. Co. v. Lexington Ins. Co.*, 188 F.3d 307, 310 (5th Cir. 1999) (stating that the FAA does not preempt state arbitration rules as long as the state rules do not undermine the goals and policies of the FAA). The *Del Piano* court found that where New Jersey's conflict of interest statute was identical in its language to the conflict of interest provision of the FAA, New Jersey's statute could not be found to stand as an obstacle to the purposes of the FAA and thus be preempted by it. *Del Piano*, *supra*, at 509.

Similarly, the Court finds here that the language of Section 23 of the NJAA mirrors the language of Section 10 of the FAA. The first four grounds of vacation under the NJAA are nearly identical to those grounds listed under the FAA. The NJAA does list two additional grounds; however, the Court does not find that these last two grounds would "impermissibly burden arbitration agreements." Rather, the

first of these two grounds simply states an arbitration award cannot be confirmed when no arbitration agreement existed in the first place, and the second of the two grounds speaks to giving proper notice of initiating an arbitration proceeding and does not concern the substance of the arbitration agreement or proceeding. Therefore, the Court finds that the NJAA does not prevent the parties here from fully arbitrating their disputes, nor does it undermine the policies of the FAA which strongly support the resolution of disputes by arbitration.

Furthermore, in *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S 468 (1989), the United States Supreme Court was presented with a dispute over an arbitration agreement entered in to by the parties. The agreement contained a provision stating that all disputes "arising out of or relating to this contract or the breach thereof" were subject to arbitration. *Id.* at 470. The agreement also had a clause providing that "[t]he Contract shall be governed by the law of [California]." *Ibid.* At issue was whether application of the California Arbitration Act was preempted by the FAA in a case where the parties agreed that their arbitration agreement was governed by the laws of California.

The United States Supreme Court held that the California Arbitration Act was not preempted by the FAA in that matter. It found that the FAA does not prevent the enforcement of agreements to arbitrate under different rules than those set forth in the FAA itself where the parties agreed to abide by state rules of arbitration. *Id.* at 479. The Court declared that were this not the case, the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms would be frus-

trated. *Ibid.* Rather, arbitration under the FAA is a matter of consent, not coercion, and parties should be generally free to structure their arbitration agreements as they see fit. *Ibid.*

In this matter, Section 10.10 of the Agreements provides that they will be "governed by and construed in accordance with the laws of the State of New Jersey (without giving effect to conflicts of law principles) as to all matters, including validity, construction, effect, performance and remedies." Therefore, because the parties have agreed to resolve their disputes under New Jersey law, the Court shall apply the NJAA to the facts of this case in determining whether the June 20, 2007 arbitration award should be confirmed.

Finally, the Court must determine whether to confirm the June 20, 2007 arbitration award pursuant to the NJAA. Defendants' primary contentions raised in support of their position that the arbitration award must be vacated are that (1) the Assignment of Claims Act was not complied with, and (2) numerous cases stand for the proposition that a private party cannot assign or transfer a takings claim against the United States to another private party. The Assignment of Claims Act, 31 U.S.C. 3727 (formerly 31 U.S.C. 203), provides that an assignment of any part of a claim against the United States Government or of an interest in the claim may be made only after a claim is allowed, the amount of the claim is decided, and a warrant for payment of the claim has been issued. Defendants contend that these requirements have not been satisfied by the parties in this matter.

Defendants also state that case law is clear in holding that private parties cannot by mutual agreement assign takings claims against the United

States. Defendants cite to *Dow v. United States*, 357 U.S. 17 (1958) which states that the Assignment of Claims Act prohibits the voluntary assignment of a compensation claim against the Government for the taking of property and that the owner of the property at the time of the taking, not the owner at an earlier or later date, receives the payment. *Id.* at 20-21. Additionally, the Government has an obligation to provide just compensation for takings. *Id.* at 24. Defendants cite to *Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997) which states that absent a valid voluntary assignment of a compensation claim against the Government for the taking of property, the general rule is that the owner at the time of the taking is the party who has the claim and is to receive payment. *Id.* at 1287. Defendants additionally cite to *Rochester Gas & Electric Corp. v. United States*, 65 Fed. Cl. 431 (2005) as a case that is "on all fours with" the present matter. In *Rochester Gas*, the plaintiff sold its nuclear plant to a third party and executed a contract with the third party which assigned its takings claims, related to the DOE's failure to remove SNF, to the third party. The United States challenged this assignment under the Assignment of Claims Act. The *Rochester Gas* court held that the plaintiff could not assign its takings claims to the third party. *Id.* at 441. It stated that a party must own the property at the time that the alleged taking occurred in order for it to be able to allege that its property right had been taken. *Ibid.* Defendants thus conclude that these cases affirm that, under the Assignment of Claims Act, the assignment of takings claims against the Government to a third party is absolutely null and void unless certain requirements, none of which were met here, are satisfied.

Based on these contentions, Defendants have made four arguments pursuant to state and federal arbitration law in asserting that the June 20, 2007 arbitration award must be vacated. First, Defendants contend that the arbitrators exceeded their powers by depriving Defendants of their fundamental constitutional right to just compensation. *See N.J.S.A.* 2A:23B-23(a)(4). Second, Defendants argue that the arbitrators failed to consider evidence which prejudiced the rights of Defendants. *See N.J.S.A.* 2A:23B-23(a)(3). Third, Defendants maintain that the arbitration clause of the Agreements is not applicable to Defendants' takings claims because the claims do not arise under the Agreements, but rather under the Fifth Amendment of the United States Constitution. *See N.J.S.A.* 2A:23B-23(a)(5). Finally, Defendants argue that the arbitrators acted in manifest disregard of the law by disregarding the above mentioned case law.

In addressing these arguments, the Court first discusses the general purview of the review of arbitration awards by New Jersey courts. Notwithstanding the apparently broad scope of a court's powers to alter an arbitrator's award as described in the statutory language, our courts have not traditionally interpreted the statutory language broadly. *Kimm v. Blisset, LLC*, 388 N.J. Super. 14, 29-30 (App. Div. 2006), *cert. den.*, 189 N.J. 428 (2007) (*citing Tretina Printing, Inc. v. Fitzpatrick & Assocs., Inc.*, 135 N.J. 349, 355 (1994)). Arbitration is a favored remedy in New Jersey, *Faherty v. Faherty*, 97 N.J. 99, 105 (1984), and a strong judicial presumption exists in favor of the validity of an arbitration award. *Del Piano, supra*, at 510. Thus, it is rather difficult for a party to successfully move a New Jersey court to amend or vacate an arbitration award. With this in

mind, the Court now addresses each of Defendants' arguments in turn.

1. *Did the Arbitrators Exceed Their Powers?*

Defendants argue that the arbitrators exceeded their powers, pursuant to *N.J.S.A.* 2A:23B-23(a)(4) because the arbitrators decided a constitutional issue incorrectly. Defendants argue that the arbitration panel ignored three different rules: (1) that when the Government takes property, it must pay for it; (2) that only the owner of property at the time of the taking is entitled to recover from the Government; and (3) that if the assignment is to an assignee who can't bring the claim against the United States, the claim reverts back to the assignor. Defendants assert that because the arbitration panel assigned Defendants' takings claims to Plaintiffs who, as the subsequent owners of the minority interests, are not entitled to bring those claims, the takings claims are in effect extinguished and the United States no longer is obligated to pay just compensation for these takings. Defendants also claim that this ruling has deprived them of their fundamental right to just compensation. Defendants conclude that because this is in contravention of the law that prohibits the forfeiture of takings claims, the arbitrators exceeded their powers, and therefore the arbitration award should be vacated.

Plaintiffs respond that the arbitration panel's authority is derived from the Agreements. Therefore, the arbitrators could have only exceeded their powers if they decided an issue that was outside the scope of the Agreements. Plaintiffs argue that the arbitrators did not decide a constitutional issue as Defendants allege, but rather decided a contractual issue based on the language of the Agreements. Plaintiffs main-

tain that because the Agreements establish that any dispute regarding the assignment of Defendants' takings claims is covered under the arbitration clause's broad scope in Section 8.3(a), the arbitrators did not step outside the bounds of their authority and thus did not exceed their powers.

An arbitrator's authority to resolve a dispute is based upon the contract between the parties. *High Voltage Eng'g Corp. v. Pride Solvents & Chemical Co. of New Jersey, Inc.*, 326 N.J. Super. 356, 361-62 (App. Div. 1999) (citing *Communications Workers of America, Local 1087 v. Monmouth County Bd. of Soc. Servs.*, 96 N.J. 442, 448 (1984)). Thus, the jurisdiction and authority of the arbitrator are circumscribed by and limited to the powers delegated to him. *Communications Workers, supra*, at 448. If an arbitrator ignores the limited authority that the contract confers, the arbitrator has exceeded his powers and the court may not defer to the arbitrator's decision. *Zervos v. Freedman Properties*, 223 N.J. Super. 599, 603 (Ch. Div. 1987) (citing *County College of Morris Staff Ass'n v. County College of Morris*, 100 N.J. 383, 391 (1985)). Therefore, in determining whether the arbitration panel had the authority to resolve the dispute as to the transfer of the takings claims from Defendants to Plaintiffs, the Court must look to the language of the Agreements.

The Court finds that it is clear that the arbitration panel had the power and authority to rule on whether the takings claims had been assigned to Plaintiffs. Section 2.1(l) of the Agreements states that the Purchased Assets include any of Defendants' claims relating to the failure of the DOE to remove SNF from the Stations. Section 2.1(m) provides that the Purchased Assets also include all of Defendants'

rights under any cause of action against third parties related to their former interests in the Stations. Thus, the dispute here over whether Defendants' takings claims were assigned to Plaintiffs is based on the language of Section 2.1(l) and Section 2.1(m). Section 8.3 of the Agreements provides that any dispute related to any provision in the Agreements is subject to arbitration. Because this dispute is based on Sections 2.1(l) and (m), it is subject to arbitration under Section 8.3.

Moreover, the Court finds that Defendants' argument that the arbitration panel's ruling will relieve the United States from its obligation to pay just compensation for its taking is irrelevant towards determining the scope of the arbitration clause in the Agreements. The arbitration panel's function was not to determine the ultimate result from the assignment of Defendants' claims, but whether Defendants' takings claims were in fact transferred to Plaintiffs as part of the Purchased Assets under the Agreements. Nor did the arbitration panel decide what would become of Defendants' assigned takings claims; rather it simply found that the Agreements' assignment language included Defendants' takings claims and that the Assignment of Claims Act did not act as an absolute prohibition of Defendants' assignment of their takings claims to Plaintiffs. Therefore, the Court finds that the arbitrators have not exceeded their powers here.

2. Did the Arbitrators Fail to Consider Evidence?

Defendants next argue, pursuant to *N.J.S.A.* 2A:23B-23(a)(3), that the arbitrators failed to consider evidence related to the potential value of their takings claims against the United States. The arbi-

tration panel addressed the viability of Defendants' claims by stating:

> It is also uncertain whether the takings theory under which the claims are being brought will prove to be viable and to what extent ACE/ Delmarva would be able to show any significant loss as a minority owner. Further assuming the sellers were able to proceed with the takings claims, it is unclear whether and to what extent any takings damages would remain for the sellers in these cases after the buyer's contract claims were resolved. *See Boston Edison*, 64 Fed. Cl. at 187. Thus, the idea that recognition of ACE/Delmarva's assignment to PSEG of the takings claims is against the public interest is speculative and may also be exaggerated.

Arb. Opinion, pp. 23-24.

Defendants contend that this assertion is entirely inappropriate and should not be a basis to justify the extinguishment of Defendants' takings claims. Defendants claim that these statements demonstrate that the arbitrators failed to consider the "undisputed evidence" indicating that Defendants' claims are viable and valuable, and thereby prejudiced Defendants and the New Jersey customers on whose behalf Defendants' takings claims are being pursued. Defendants point to the evidence that there is a long-standing basis for takings claims of this nature, that Defendants' claims have already withstood a summary judgment motion by the United States,[2] and

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[2] This point, however, is now mooted after the Court of Federal Claims granted the United States' most recent motion for summary judgment on November 13, 2007, as mentioned *supra*.

that substantially identical claims in a recent case withstood all motions to invalidate them. In *Boston Edison Co., v. United States*, 64 Fed. Cl. 167 (2005), the Court of Federal Claims denied the government's motion for summary judgment against the plaintiff, and according to Defendants, the trial has recently concluded with asserted damages of over $100 million. *See* Cert. of Nicholas Mattia, ¶10. Defendants have retained the same expert used in the *Boston Edison Co.* case, and this expert has proffered that Defendants' claims may be worth $70-80 million. *See ibid.* Therefore, by ignoring the evidence demonstrating that Defendants' takings Claims have merit to them, Defendants' argue that they have been substantially prejudiced by the arbitrators.

Defendants also argue that the arbitration panel failed to consider the aforementioned litany of cases that Defendants cited to in support of their position that the only party able to bring a takings claim against the Government is the owner of the property at the time of the taking, and any attempt to assign such a claim to a third party is invalid. Defendants state that the arbitrators made absolutely no reference to *Dow*, *supra*, or *Argent*, *supra*, and only referred to *Rochester Gas*, *supra*, as support for an unrelated proposition despite the fact that these were the cases that Defendants primarily relied on. Therefore, Defendants contend that the arbitration panel failed to consider the propositions that these cases stand for and were thereby prejudiced. Defendants argue that the arbitration panel should have distinguished these opinions in order to demonstrate that the panel considered this evidence.

Plaintiffs respond that just because a judge has allowed a takings claim in another case to make it to

trial does not establish the validity of Defendants' takings claims in their case against the United States in the Court of Federal Claims. Plaintiffs contend that arbitration awards have only been vacated on this basis when the arbitrators haven't allowed evidence to be entered or presented, not when the arbitrators have found evidence to simply be not compelling. Moreover, Plaintiffs state that this evidence is not material to the underlying issue of whether Defendants assigned their takings Claims to Plaintiffs when the parties executed the Agreements. Finally, Plaintiffs argue that the arbitration panel did not have to address this litany of cases because, contrary to Defendants' assertions, no case exists which states that a takings claim cannot be assigned between private parties. Therefore, Plaintiffs argue that the arbitration panel did not fail to consider material evidence in making its decision.

The Court finds that this evidence that the arbitration panel allegedly failed to consider was not material to the controversy at issue, i.e., whether Defendants assigned their takings claims to Plaintiffs pursuant to the Agreements. The arbitration panel addressed the viability of Defendants' taking claims in support of its finding that Defendants felt they were getting a fair value for their minority interests in the Stations regardless of any takings claims. This finding contradicts Defendants' belief that Plaintiffs would be receiving a windfall if the arbitration panel found that the takings claims had been assigned, because (1) the viability of the takings claims is uncertain, and (2) the amount of liabilities assumed by Plaintiffs from Defendants remains uncertain. But the arbitration panel stated that "[w]hatever rhetorical force this argument may have, it does not give the Panel license to rewrite the [Agreements],

which plainly state (multiple times) that all claims relating to SNF are assigned to PSEG." Arb. Opinion at 23. Therefore, the Court finds that the arbitration panel based its decision on the language of the Agreements, and not the issue of viability of the takings claims. Thus, the evidence that the arbitration panel purportedly failed to consider was immaterial to its finding that pursuant to the Agreements, the takings claims were assigned.

Moreover, the Court finds that the arbitration panel need not have cited to the litany of cases presented to it by Defendants because the arbitration panel recognized that only the United States could invoke the Assignment of Claims Act as a defense, and that the United States had the authority to consent to an assignment of takings claims. Defendants allege that *Dow*, *supra*, *Argent*, *supra*, and *Rochester Gas*, *supra*, all affirm that under the Assignment of Claims Act, the assignment of takings claims against the Government to a third party is "absolutely null and void" unless certain specific requirements are met. However, the arbitration panel rejected this alleged proposition by stating that the Government could consent to an assignment of a claim that would otherwise violate the Assignment of Claims Act, *see Vt. Yankee Nuclear Power Corp. v. United States*, 73 Fed. Cl. 236, 240 (2006), and that only the United States could invoke the Assignment of Claims Act to void the assignment. *See United States v. Certain Space in Property Known as Chimes Bldg.*, 320 F Supp. 491, 496 (N.D.N.Y. 1969), *aff'd*, 435 F.2d 872 (2d Cir. 1970). Furthermore, the arbitration panel stated that Defendants' contention that they could not have assigned the takings claims at issue rang hollow, and that Defendants failed to cite to any cases in which the Assignment of Claims Act has

been used to invalidate an assignment as between private parties. The Court thereby finds that the arbitration panel did consider the cases cited by Defendants, but simply found that none of them prohibited the assignment of Defendants' takings claims at issue here. Therefore, the Court finds that Defendants' second argument that the arbitration panel failed to consider evidence must fail.

3. Is the Arbitration Clause Applicable to Defendants' Takings Claims?

Third, Defendants argue, pursuant to *N.J.S.A.* 2A:23B-23(a)(5), that the arbitration clause in the Agreements does not apply to Defendants' takings claims. Defendants state that Section 8.3 of the Agreements provides that any dispute relating to or arising out of any provision of this Agreement is subject to arbitration. However, Defendants argue that their takings claims do not arise out of the Agreements, but rather under the Fifth Amendment of the United States Constitution. Therefore, Defendants conclude that there was no agreement to arbitrate the assignment of their takings claims and thus the arbitration panel was without jurisdiction in making the arbitration award. Defendants additionally argue that because under the Assignment of Claims Act, the assignment of claims against the United States is rarely permitted in circumstances not relevant here, there could be no agreement to arbitrate the assignment of Defendants' takings claims here.

Plaintiffs respond that this argument invokes the same issues that Defendants raised in their argument that the arbitrators exceeded their powers because the Court, in resolving the issue, must determine the scope of the arbitration clause. Plaintiffs

again state that the language of the arbitration clause is clear in granting the arbitration panel jurisdiction over whether Defendants assigned their takings claims to Plaintiffs.

The Court finds that Defendants' arguments here are unpersuasive. The Court agrees that Defendants' takings claims against the United States do arise under the Fifth Amendment of the United States Constitution. However, the dispute between Defendants and Plaintiffs does not regard the merits of Defendants' takings claims against the United States. Rather, the dispute arises from whether, by executing the Agreements, Defendants assigned their takings claims to Plaintiffs as part of the Purchased Assets. This dispute thereby clearly arises from Section 2.1 of the Agreements which discusses which assets Plaintiffs are receiving. Therefore, the Court finds that there is an agreement to arbitrate whether Defendants' takings claims have been assigned to Plaintiffs.

Moreover, Defendants' argument under the Assignment of Claims Act does not change the fact that the arbitration clause in Section 8.3 applies to the dispute in this matter. The parties are both sophisticated, and were free to contract to any terms in the Agreements to their satisfaction. As the Court has already stated, the Assignment of Claims Act does not place an absolute prohibition on an assignment of takings claims against the United States from one party to another; the United States may choose to consent to such an assignment. Therefore, the Court finds that the arbitration clause in Section 8.3 is applicable to the assignment of Defendants' takings claims.

4. *Did the Arbitrators Act in Manifest Disregard of the Law?*

Finally, Defendants argue that the arbitrators acted in manifest disregard of the law. The Court first finds that it need not address this argument in light of its decision to apply the NJAA to this matter. It is clear to the Court that New Jersey law does not recognize "manifest disregard of the law" as a basis for vacation of an arbitration award. The Court first notes that the NJAA does not list "manifest disregard of the law" or other similar language as a reason under which an arbitration award can be vacated. *See N.J.S.A.* 2A:23B-23. Moreover, case law interpreting the former statute governing the vacation of an arbitration award, *N.J.S.A.* 2A:24-8 (nearly identical to the first four subsections of *N.J.S.A.* 2A:23B-23(a)), has held that a mistake of law is not a ground for the vacation of an arbitration award. In *Tretina v. Fitzpatrick & Assocs.*, 135 N.J. 349 (1994), the New Jersey Supreme Court discussed the previously existing standard under which a court could vacate an arbitration award whenever an arbitrator's award "embraced egregious mistakes of law." *See Perini Corp. v. Greate Bay Hotel & Casino, Inc.*, 129 N.J. 479, 496 (1992). However, the *Tretina* court rejected this standard and adopted the standard articulated by Chief Justice Wilentz in his concurring opinion in *Perini Corp.*, *supra*, which held that arbitration awards may be vacated only for fraud, corruption, or similar wrongdoing on the part of the arbitrators, and can be corrected or modified only for very specifically defined mistakes.[3] *Tretina*, *supra*, at 358.

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[3] These mistakes are defined at *N.J.S.A.* 2A:24-9 as cited in *Tretina*, *supra*, and now pursuant to the NJAA at *N.J.S.A* 2A:23-20 and are not applicable to the present matter.

Thus, a mistake of law provides no basis for the vacation of an arbitration award. *See Cap City Products, Co. v. Louriero*, 332 *N.J. Super.* 499, 504 (App. Div. 2000). Therefore, the Court finds that Defendants are not entitled to seek vacation of the June 20, 2007 arbitration award on the alleged basis that the arbitrators acted in manifest disregard of the law.

Even were the Court to address Defendants' contention that the arbitrators acted in manifest disregard of the law, the Court would find that no support exists here for that position. Defendants argue that *Rochester Gas*, *supra*, is "on all fours" with the situation at issue here. However, in *Rochester Gas*, *supra*, the United States was the party who challenged this assignment under the Assignment of Claims Act. Here the Defendants are attempting to invoke the Assignment of Claims Act in barring the assignment of their takings claims to Plaintiffs. As discussed, *supra*, only the United States may invoke the Act as a defense to an assignment of claims against it. *See, e.g.*, *United States v. Aetna Gas. & Sur. Co.*, 338 U.S. 366, 371 (1949); *Martin v. National Sur. Co.*, 300 U.S. 588, 594 (1937). Moreover, the United States has expressly accepted the assignment of Defendants' takings claims to Plaintiffs, something it has the right to recognize. *See Tuftco Corp. v. United States*, 614 F.2d 740, 745 (Fed. Cl. 1980). Therefore, although the facts underlying the takings claims here may be similar to those facts in *Rochester Gas*, the fact that the United States has consented to the assignment here rather than attacked its validity distinguishes the situation here from that in *Rochester Gas*.

Moreover, the Court finds that the other cases cited by Defendants which are allegedly manifestly ignored by the arbitration panel do not support Defendants'

position. Defendants contend that *Dow*, *supra*, stands for the proposition that any attempt to assign a takings Claim against the United States to a third party is invalid. Although this may be generally true, Defendants' reliance on *Dow* ignores the above mentioned precedent stating that the United States may consent to an assignment even if it doesn't comply with the requirements of the Assignment of Claims Act. Defendants' reliance on *Argent*, *supra*, and *United States v. Shannon*, 342 U.S. 288 (1952) is also misguided. These cases have held that absent a valid voluntary assignment of a compensation claim against the Government for the taking of property, the general rule is that the owner at the time of the taking is the party who has the claim and is to receive payment. These cases do not preclude the Government from recognizing assignment of takings claims and thereby removing the absence of a valid voluntary assignment. Therefore, it certainly cannot be said that this is one of those exceedingly rare instances where some egregious impropriety on the part of the arbitrators is apparent.

The Court thereby finds that all of Defendants' arguments in support of their position that the June 20, 2007 arbitration award should be vacated must be rejected. Therefore, the Court will confirm the June 20, 2007 arbitration award in this matter.

For the above stated reasons, Plaintiffs' request to confirm the June 20, 2007 arbitration award is GRANTED.

APPENDIX C

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

[Filed October 6, 2008]

Docket No. A-002559-07T3

PSEG POWER

vs.

ATLANTIC CITY ELECTRIC

ORDER DISMISSING APPEAL

This matter being opened to the Court on its own motion and it appearing from the attached that the appellant has requested that the appeal be withdrawn;

It is HEREBY ORDERED that the above appeal is dismissed.

WITNESS, the Honorable Edwin H. Stern, Presiding Judge for Administration, at Trenton, this 06 day of October, 2008.

/s/ John M. Chacko
John M. Chacko
Clerk of the Appellate Division

APPENDIX D

PSE&G CONTRACT NO. 83-6-ND-684
U.S. DEPARTMENT OF ENERGY
CONTRACT NO. DE-CR01-83NE44480
SALEM GENERATING STATION
NOS. 1 AND 2 UNITS

CONTRACT FOR DISPOSAL OF SPENT NUCLEAR FUEL AND/OR HIGH-LEVEL RADIOACTIVE WASTE

THIS CONTRACT, entered into this 13th day of June 1983, by and between the UNITED STATES OF AMERICA (hereinafter referred to as the "Government"), represented by the UNITED STATES DEPARTMENT OF ENERGY (hereafter referred to as "DOE") and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, (hereinafter referred to as the "Purchaser"), a corporation organized and existing under the laws of the State of New Jersey, acting on its own behalf as managing utility for Salem Generating Station, Nos. 1 and 2 Units and on behalf of the joint owners, Philadelphia Electric Company, Atlantic City Electric Company, and Delmarva Power and Light Company.

* * * *

PSE&G CONTRACT NO. 83-6-ND-684
U.S. DEPARTMENT OF ENERGY
CONTRACT NO. DE-CR01-83NE44480
SALEM GENERATING STATION
NOS. 1 AND 2 UNITS

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* * * *

APPENDIX E

(DP&L-SALEM)

PURCHASE AGREEMENT

BY AND BETWEEN

DELMARVA POWER & LIGHT COMPANY

and

PSEG POWER LLC

Dated as of September 27, 1999

* * * *

ARTICLE II

PURCHASE AND SALE

2.1 Transfer of Purchased Assets. Upon the terms and subject to the conditions set forth in this Agreement, at the Closing. Seller shall sell, assign, convey, transfer and deliver to Buyer, and Buyer shall purchase, assume and acquire from Seller, free and clear of all Encumbrances, except for the Permitted Encumbrances, all of Seller's rights, title and interests, of whatever kind and nature, whether tangible or intangible, in and to all assets (except for the Excluded Assets) constituting or used and necessary for the operation of the Salem Station or any portion thereof, together with all goodwill relating thereto, including, without limitation, those assets listed below, each as in existence on the Closing Date (collectively, the "Purchased Assets"):

(a) The Real Property;

(b) The Inventories;

(c) The Nuclear Materials held pursuant to the NRC Licenses;

(d) The Fuel Supplies;

(e) All machinery (mobile or otherwise), equipment (including computer hardware and software and communications equipment), vehicles, tools, spare parts, fixtures, furniture, furnishings and other personal property located at or in transit to the Salem Station or used and necessary for the operation of the Salem Station, in each case, on the Closing Date (collectively, the "Tangible Personal Property"), including the electrical transmission assets (as opposed to generation assets) set forth in Schedule 2.1(e);

(f) Subject to the receipt of necessary consents and approvals, the Seller's Agreements;

(g) Subject to the receipt of necessary consents and approvals, the Transferable Permits and all of Seller's rights, title and interests in and to any other permits, registrations, franchises, certificates, licenses and other authorizations, consents and approvals of Governmental Authorities relating to the ownership, lease, maintenance or operation of the Salem Station or any portion thereof;

(h) Seller's Nonqualified Decommissioning Funds as of the Closing Date, including all income, interest and other earnings accrued thereon, together with all required accounting and other records;

(i) Seller's Qualified Decommissioning Funds as of the Closing Date, including all income, interest and other earnings accrued thereon, together with all required accounting and other records;

(j) All books, operating records, operating, safety and maintenance manuals, engineering design plans, blueprints and as-built plans, specifications, proce-

dures and similar items of Seller relating specifically to the Salem Station (subject to the right of Seller to retain copies of same for its use) other than such items which are proprietary to third parties and accounting records;

(k) All unexpired, transferable warranties and guarantees from third parties arising out of, in respect of, or in connection with, (i) any item of Real Property or personal property, or interest therein, included in the Purchased Assets or

(ii) the Assumed Liabilities;

(l) All claims of Seller relating to or pertaining to the Department of Energy's defaults under the Department of Energy Standard Contract (including all claims for failure by the Department of Energy to take Spent Nuclear Fuel) accrued prior to, on or after the Closing Date, whether relating to periods prior to, on or after the Closing Date, and all other claims of Seller against the Department of Energy with respect to, arising out of or in connection with the Purchased Assets, other than the claims described in Section 2.2(1); and

(m) The rights of Seller in, to and under all causes of action against third parties with respect to, arising out of or in connection with Seller's rights, title and interests in and to the Purchased Assets or the Assumed Liabilities, or any portion thereof, whether accruing prior to, on or after the Closing Date, other than any such causes of action as constitute Excluded Assets or Excluded Liabilities whether received as payment or credit against future liabilities, in each case, relating to any period prior to, on or after the Closing Date, other than the claims described in Section 2.2(m).

2.2 Excluded Assets. Notwithstanding anything to the contrary in this Agreement, nothing in this Agreement shall constitute or be construed as requiring Seller to sell, assign, convey, transfer or deliver, and Buyer shall not be entitled to purchase or acquire, any right, title or interest in, to or under the following assets and properties which are associated with the Purchased Assets, but which are hereby specifically excluded from the definition of Purchased Assets (collectively, the "Excluded Assets"):

(a) The right, title and interest of Seller in, to and under all electrical transmission or distribution assets (as opposed to generation assets) located at or forming part of the Salem Station (whether or not regarded as a "transmission" or "generation" asset for regulatory or accounting purposes), including all switchyard facilities, substation facilities and support equipment, as well as all permits, contracts (including the LDV Agreement) and warranties, to the extent they relate to such transmission and distribution assets (other than the electrical transmission assets identified in Schedule 2.1(e) included as Purchased Assets) (collectively, the "Transmission Assets");

(b) The right, title and interest of Seller in, to and under certain switches and meters, gas facilities, revenue meters and remote testing units, drainage pipes and systems, pumping equipment and associated piping, in each case, located at or forming part of the Salem Station as identified in Schedule 2.2(b) attached hereto;

(c) All certificates of deposit, shares of stock, securities, bonds, debentures, evidences of indebtedness, and interests in joint ventures, partnerships, limited liability companies and other entities, including account balances under Seller's Insurance

Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's insurance Policies, but excluding such assets comprising the Decommissioning Funds;

(d) All Seller's Insurance Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's Insurance Policies;

(e) All cash, cash equivalents, bank deposits, accounts and notes receivable (trade or otherwise), and prepaid expenses, including premiums and account balances under Seller's Insurance Policies and the right, title and interest of Seller in, to and under account balances held by NEIL under Buyer's Insurance Policies, and any income, sales, payroll or other Tax receivables (in each case, whether held by Seller or any third party, including Buyer under the Owners Agreement), but excluding such assets comprising the Decommissioning Funds;

(f) The right, title and interest of Seller in, to and under all intellectual property, including the names "Delmarva Power & Light Company", "DP&L" or any derivation thereof, as well as any related or similar name, or any other trade names, trademarks, service marks, corporate names and logos, or any part, derivation, colorable imitation or combination thereof;

(g) All tariffs, agreements and arrangements with Persons other than Buyer to which Seller is a party for the purchase or sale of electric capacity or energy, or for the purchase of transmission, distribution or ancillary services;

(h) Other than with respect to the Decommissioning Funds, all Tax refunds or credits (including refunds or credits of real property Taxes paid or due

with respect to the Salem Station or any related Real Property), which refunds or credits are owed to Seller with respect to periods prior to the Closing Date, whether directly or indirectly, under the Owners Agreement or otherwise regardless of when actually paid (which refunds or credits shall be net to Seller of all reasonable out-of-pocket costs and expenses (including legal fees) incurred by Buyer in connection with obtaining the portion of such Tax refund or credit owed to Seller);

(i) The minute books, stock transfer books, corporate seal and other corporate records of Seller;

(j) The right, title and interest of Seller in, to and under all contracts, agreements, arrangements, licenses and leases of any nature, other than the Seller's Agreements;

(k) All other assets and properties owned or leased by Seller which are not used and necessary for the operation of the Salem Station or any portion thereof;

(l) All claims of Seller relating to or pertaining to any refund or credit received on or after the Closing Date by Buyer or its successors or permitted assigns of all or any part of Department of Energy Decommissioning and Decontamination Fees for which Seller is or was liable; provided that Seller shall not have any right to pursue such claims separately, but shall be entitled to pursue such claims solely by joint action with Buyer and any other interested parties approved by Buyer, such action to be controlled by Buyer in its sole discretion; provided, also, that if Buyer shall receive any such refund or credit on or after the Closing Date of all or any part of such Department of Energy Decommissioning and Deconta-

mination Fees, Seller's claim to a portion of such refund shall be limited to the amount of such refund or credit multiplied by a fraction, (i) the numerator of which is the amount of Decommissioning and Decontamination Fees with respect to the Salem Station paid by Seller or on Seller's behalf, and (ii) the denominator of which is the amount of Decommissioning and Decontamination Fees with respect to the Salem Station paid by all of the parties to the Owners Agreement or on their behalf; and provided, further, that the aforesaid claims shall constitute Excluded Assets (rather than Purchased Assets) after the Closing only if Seller shall continue to pay after the Closing its proportionate share of the costs and expenses (including reasonable legal fees) of pursuing any such claims (but not Department of Energy Decommissioning and Decontamination Fees), such proportionate share to be determined as if Seller had not transferred its rights, title and interests in and to the Purchased Assets to Buyer;

(m) All rights of Seller in, to and under the action against Westinghouse Electric Corporation or its Affiliates, or their respective successors or assigns, captioned *Public Service Electric & Gas Company, et al. v. Westinghouse Electric Corporation*, C.A. No. 96-925 (MTB) in the United States District Court for the District of New Jersey. and all related actions currently pending in state courts; provided that the aforesaid claims shall constitute Excluded Assets (rather than Purchased Assets) after the Closing only if Seller shall continue to pay after the Closing its proportionate share of the costs and expenses (including reasonable legal fees) of pursuing any such claims, such proportionate share to be determined as if Seller had not transferred its rights, title and interests in and to the Purchased Assets to Buyer; and

(n) The right, title and interest of Seller in. to and under this Agreement, the Collateral Agreement and the Additional Agreements.

2.3 Assumed Liabilities. At the Closing, Buyer shall assume and agree to pay, perform and otherwise discharge, without recourse to Seller (other than as set forth herein or in the Owners Agreement, as amended by the Amendment to Owners Agreement), in accordance with the terms and subject to the conditions set forth herein, all of the liabilities and obligations of Seller, direct or indirect, known or unknown, asserted or unasserted, absolute or contingent, accrued or unaccrued, which relate to the Purchased Assets (other than Excluded Liabilities) (the "Assumed Liabilities"), including those set forth below; provided that nothing set forth in this Section 2.3 shall require Buyer to assume any liabilities or obligations that are expressly excluded pursuant to Section 2.4:

* * * *

(f) All liabilities and obligations of Seller in respect of Spent Nuclear Fuel, including Spent Nuclear Fuel Fees, whether such liability or obligation is known or unknown, contingent or accrued, and whether arising or occurring prior to, on or after the Closing Date, except as specified in Section 2.6 (collectively, "Assumed Spent Fuel Liabilities") . . . .

* * * *

2.5 Control of Litigation.

(a) The Parties acknowledge and agree that, from and after the Closing Date, Seller shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Excluded Assets or Excluded Lia-

bilities, so long as such control, defense or settlement does not unreasonably interfere with Buyer's operation of the Salem Station; and Buyer agrees to cooperate fully in connection therewith, provided, however, that Seller shall reimburse Buyer for all reasonable costs and expenses incurred in providing such cooperation.

(b) The Parties acknowledge and agree that, from and after the Closing Date, Buyer shall be entitled exclusively to control, defend and settle any suit, action or proceeding, and any investigation arising out of or related to any Purchased Assets or Assumed Liabilities, so long as such control, defense or settlement does not unreasonably interfere with Seller's ownership of the Excluded Assets or with the Excluded Liabilities; and Seller agrees to cooperate fully in connection herewith provided, however, that Buyer shall reimburse Seller for all reasonable costs and expenses incurred in providing such cooperation.

2.6 Spent Nuclear Fuel Fees. Seller, to the extent of the Salem Interest, shall be liable for and pay, pursuant to the Owners Agreement, all Spent Nuclear Fuel Fees in effect prior to the Closing Date with respect to its share of electricity generated at and sold from the Salem Station prior to the Closing Date, and Buyer shall have no liability or obligation in respect thereof. Buyer shall be liable for and pay all Spent Nuclear Fuel Fees with respect to its share of electricity generated at and sold from the Salem Station, including that relating to the Salem Interest, from and after the closing date, together with all additional Spent Nuclear Fees that are assessed or become effective on or after the Closing Date, whether assessed with respect to electricity generated at or sold from the Salem Station prior to,

on or after the Closing Date, and Seller shall have no further liability or obligation in respect thereof. Without limiting the liability of Buyer under Sections 2.3(e) and (f), from and after the Closing Date, Buyer shall assume title to, and such liabilities and obligations as Seller may have for the storage and disposal of, Spent Nuclear Fuel presently stored at the Salem Station (including any such fuel which may have been used in connection with generating Seller's share of electricity at the Salem Station). From and after the Closing Date, Buyer shall have all rights of recovery from third parties and the Department of Energy relating to, arising from or in connection with the Department of Energy's failure to take Spent Nuclear Fuel.

* * * *

6.8 Risk of Loss. From the date hereof through (but not including) the Closing Date, all risk of loss or damage to the assets or properties included in the Purchased Assets (other than the Decommissioning Funds) shall be borne by Seller. Notwithstanding any provision hereof to the contrary, subject to Section 9.1(g) if, before the Closing Date, all or any portion of the Purchased Assets is (i) condemned or taken by eminent domain or is the subject of a pending or threatened condemnation or taking which has not been consummated or (ii) damaged or destroyed by fire or other casualty, Seller shall notify Buyer promptly in writing of such fact, and (x) in the case of a condemnation or taking, Seller shall assign or pay, as the case may be, any proceeds thereof to Buyer at the Closing and (y) in the case of a fire or other casualty, Seller shall either restore such damage or assign the insurance proceeds therefore (and pay the amount of any deductible and/or self-insured amount

in respect of such casualty) to Buyer at the Closing. Notwithstanding the foregoing, if such condemnation, taking, damage, destruction or other casualty results in a Material Adverse Effect, Buyer and Seller shall negotiate to settle the loss resulting from such condemnation, taking, damage, destruction or other casualty (and such negotiation shall include the negotiation of a fair and equitable reduction of the Purchase Price). If no such settlement can be agreed upon within sixty (60) days after Seller has notified Buyer of such casualty or loss, then Buyer or Seller may terminate this Agreement pursuant to Section 9.1(g).

* * * *

8.3 Arbitration.

(a) Notwithstanding any provision hereof to the contrary, in the event of any dispute between Seller and Buyer arising after the Closing (whether relating to facts, events or circumstances occurring or existing prior to, on or after the Closing Date) and relating to or arising out of any provision of this Agreement (other than disputes arising under Section 2.3, 2.4, 3.2, 3.3, 3.4, 6.5, 8.1(a)(iii) or 8.1 (b)(iii)), the sole remedy available to either Party is the dispute resolution procedure set forth in this Section 8.3; provided, however, that either Party may seek a preliminary injunction or other provisional judicial remedy if such action is necessary to prevent irreparable harm or preserve the status quo, in which case both Parties shall nonetheless continue to pursue resolution of the dispute by means of this procedure. The Party asserting such dispute shall give written notice to the other of the fact that a dispute has arisen pursuant hereto. Such notice shall include (i) a statement setting forth in reasonable detail the facts,

events, circumstances, evidence and arguments underlying such dispute and (ii) proposed arrangements for a meeting to attempt to resolve the dispute to be held within sixty (60) days after such notice is given. Within thirty (30) days after such notice is given, the other Party hereto shall submit to the Party giving such notice a written summary responding to such statement of facts, events, circumstances, evidence and arguments contained in the notice and an acceptance of or proposed alternative to the meeting arrangements set forth in the initial notice.

* * * *

APPENDIX F

STATUTES

9 U.S.C. § 9 (2006) Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

* * * *

9 U.S.C. § 10 (2006) Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

* * * *

9 U.S.C. § 13 (2006) Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

* * * *

28 U.S.C. § 1738 (2006) State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

* * * *

APPENDIX G

CONSTITUTIONAL PROVISIONS

U.S. CONSTITUTION, ARTICLE III, § 2

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

* * * *

U.S. CONSTITUTION, ARTICLE IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

* * * *

REPLY BRIEF

15 (5)

No. 08-790

Supreme Court, U.S.
FILED
APR 3 - 2009
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DELMARVA POWER & LIGHT COMPANY and
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS DELMARVA POWER & LIGHT COMPANY and ATLANTIC CITY ELECTRIC COMPANY

FREDERICK M. LOWTHER
Counsel of Record
RICHARD J. CONWAY
BETH L. WEBB
JOAN M. DARBY
JANET M. ROBINS
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200

April 3, 2009

Counsel for Petitioners

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Delmarva Power & Light Company and Atlantic City Electric Company submitted a Rule 29.6 corporate disclosure statement in their Petition for a Writ of Certiorari filed on December 17, 2008.

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IN THE

Supreme Court of the United States

No. 08-790

DELMARVA POWER & LIGHT COMPANY and
ATLANTIC CITY ELECTRIC COMPANY,
Petitioners,

v.

UNITED STATES and
PSEG NUCLEAR, LLC and
PUBLIC SERVICE ELECTRIC AND GAS CO.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF OF PETITIONERS DELMARVA POWER & LIGHT COMPANY and ATLANTIC CITY ELECTRIC COMPANY

I. ACE/DELMARVA'S TAKINGS CLAIMS FOR DIMINISHED VALUE WILL BE EXTINGUISHED ABSENT A GRANT OF CERTIORARI

This case involves the assignment of takings claims for diminished value against the Government to a party who may not bring the claims. Both lower courts found that the assignment was invalid under

the Claims Act (36a; 6a).[1] The only question is whether the Government's purported "waiver" of the statute can validate such an assignment and, if so, whether the Government may use a waiver to extinguish claims under the Fifth Amendment.

The contention of the United States and PSEG (together, Respondents) that the Claims Act does not treat takings claims differently from other claims (United States Brief (US)14; PSEG Brief (P)18) misses the critical point that takings claims may only be brought by the owner of the property at the time of the taking. Takings claims may not be brought by a buyer of the property even where all claims associated with the property have been assigned. That is the holding of this Court in *United States v. Dow*, 357 U.S. 17 (1958), which was followed in another spent nuclear fuel (SNF) case before the Court of Federal Claims, *Rochester Gas & Electric Corp. v. United States*, 65 Fed. Cl. 431, 441-42 (2005). Respondents dismiss *Dow* and *Rochester Gas* on the irrelevant ground that there the Government did not accept the assignment or otherwise waive the Claims Act (US15; P16). The simple fact is that, regardless of acceptance or waiver, under *Dow* and *Rochester Gas*, ACE/Delmarva are the only parties who may bring the takings claims that, in the hands of PSEG – the buyers who benefited from the diminished value – would be truly extinguished.

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[1] PSEG's argument that ACE/Delmarva's assignments to PSEG were valid as between ACE/Delmarva and PSEG is irrelevant. Every case involving the Claims Act, by definition, includes an assignment. The issue is whether the assignment is valid as to the Government. *See infra* pp. 9-10.

PSEG's assertion that it is pursuing the takings claims "under a different theory" (P17) and the United States' suggestion that PSEG may do so (US17) are pure rhetoric. A claim brought by PSEG would collide head on with *Dow*'s pronouncement that a subsequent property owner may not receive compensation for the taking, 357 U.S. at 20-21, and *Rochester Gas*'s holding that only the owner at the time may allege a taking, 65 Fed. Cl. at 441. It would also be met by the United States' assertion that any recovery PSEG might achieve would be offset by the benefit PSEG derived by paying a lower price for ACE/Delmarva's property (US17-18). That is the position that the Government took in accepting the assignment (53a), has recently taken in the only SNF case in which a seller's diminished value damages have been adjudicated,[2] and continues to take in its brief here (US17-18). Its position confirms that the result of permitting the Government to "accept" the assignment would not only be to extinguish ACE/Delmarva's "ability to recover a share of any just compensation" (P18), but to extinguish the diminished value takings claims entirely. There would indeed be a very real "danger . . . that takings will go uncompensated" (P17-18), a result unacceptable under the Fifth Amendment.

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[2] On February 3, 2009, in the partially consolidated cases of *Boston Edison Co. v. United States* and *Entergy Nuclear Generation Co. v. United States* (Fed. Cl. Docket Nos. 99-447C and 03-2626C), the Government filed a Counterclaim stating (at ¶ 60) that "the Government is entitled to offset against or recoup from any damages awarded to ENGC the amount of $40.03 million, which represents the amount awarded to BECO upon BECO's claim."

II. THERE IS NO PRECEDENT TO SUPPORT THE GOVERNMENT'S USE OF A WAIVER DEVICE TO AVOID LIABILITY

The myriad cases cited by Respondents are designed to, but cannot, obscure the singular fact that no court has permitted, and no precedent supports permitting, the Government to accept the assignment of a claim not yet reduced to a value. Every case cited by Respondents – save one[3] – is either a Contracts Act case, or a Claims Act case in which the claim had been liquidated.

While PSEG refrains from citing Contracts Act cases, the United States persists in relying on Contracts Act cases interchangeably with Claims Act cases throughout its brief.[4] Because the Claims Act and the Contracts Act are separate statutes addressing different subject matters, cases permitting the Government to waive the Contracts Act do not support a conclusion that the Government may waive the Claims Act.[5]

Both Respondents completely ignore the critical point of distinction in the Claims Act cases they cite, as opposed to those ACE/Delmarva rely on: while the Government may accept the voluntary transfer of liquidated claims (and there is an exception for non-

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[3] *See infra* pp. 7-8.

[4] Contracts Act cases cited by the United States include: *Tufco Corp. v. United States*, 614 F.2d 740 (Ct. Cl. 1980) (US2, US11, US13, US14); *Maffia v. United States*, 163 F. Supp. 859 (Ct. Cl. 1958) (US2, US11, US14); and *Riviera Finance of Texas, Inc. v. United States*, 58 Fed. Cl. 528 (2003) (US11).

[5] See Petition at 15-18 for a discussion of the key points of distinction, all of which Respondents ignore.

voluntary transfers "by operation of law"[6]), it may not accept the voluntary transfer of claims – like ACE/Delmarva's diminished value takings claims – that have not yet been liquidated.[7]

ACE/Delmarva's reliance on *McKnight v. United States*, 98 U.S. 179 (1878), and this Court's other Claims Act cases[8] is well placed. *McKnight* involved the assignment of a government contractor's right to compensation; after the claim was allowed and a warrant for payment issued, the Government paid part of the claim to the assignees, but withheld a

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[6] *See infra* note 10.

[7] The United States consistently mischaracterizes ACE/Delmarva's position, stating first that ACE/Delmarva concede that the Government "generally" may waive the Claims Act, but that this authority does not encompass takings claims (US9) and, to the contrary, that ACE/Delmarva contend "that the government cannot waive the protections of the [Claims Act] at all" (US12). ACE/Delmarva's position is simple: (1) unallowed takings claims may not be assigned for the reasons set forth in Section I; (2) while the Government does not have "general" authority to accept assigned claims, it does have limited power to accept liquidated claims in strict compliance with the Claims Act; and (3) strict compliance is not always necessary where claims have been liquidated and the Government has discharged its obligation and no longer has an interest. The additional allegation that ACE/Delmarva waived their argument by conceding that the Government may accept the assignment of contractual breach claims (US12) is wrong. As noted in the Petition (at 7 n.3), *Rochester Gas* held that the Nuclear Waste Policy Act of 1982 is a statutory override of the Contracts and Claims Acts that permits the assignment of contract claims against the Government, but not takings claims. 65 Fed. Cl. at 441 & n.11.

[8] *See* Petition at 13 & n.10 (citing *United States v. Gillis*, 95 U.S. 407 (1877); *Spofford v. Kirk*, 97 U.S. 484 (1878); *Nutt v. Knut*, 200 U.S. 12 (1906); *Nat'l Bank of Commerce v. Downie*, 218 U.S. 345 (1910)).

portion as a setoff on the contractor's debt to the Government. The Court determined that the partial payment did not constitute a waiver with respect to the remainder. While the United States correctly quotes the Court's observation that "[t]here could have been no consideration for" such a waiver (US13), it neglects to acknowledge the Court's holdings that "no one had authority to make it," that such a waiver would be "without validity," and that "[t]he statute is conclusive upon the subject," *McKnight*, 98 U.S. at 186. With regard to the Government's counterclaim for return of the partial payment, the Court did not permit the Government to "waive" the Claims Act (P14 n.8) or "permissibly accept" a partial assignment (US13). The Court simply found that, where the Government had already paid an allowed claim to assignees with a valid claim against the assignor, the Government could not recoup the dollars paid. *McKnight*, 98 U.S. at 185-86.

The Claims Act cases relied on by Respondents are all cases in which, similarly, the Court ruled that the Claims Act protections were not applicable because the Government had already made payments on liquidated claims. They do nothing to undermine the Claims Act precedent that applies to claims that have not yet been liquidated, like ACE/Delmarva's. *See, e.g.*, *Bailey v. United States*, 109 U.S. 432, 435-36, 440 (1883) (P12-13) (protections of the statute could not be invoked by assignor to recover from the Government an amount already paid to assignee); *Freedman's Sav. & Trust Co. v. Shepherd*, 127 U.S. 494, 505-06 (1888) (P13) (protections not relevant to claims for rent already paid by Government); *McGowan v. Parish*, 237 U.S. 285, 295 (1915) (US11) (Government paid an allowed claim into court;

Government parties were dismissed);[9] *Martin v. Nat'l Sur. Co.*, 300 U.S. 588, 594-95 (1937) (P15) (Government did not need protections because its obligation was already discharged).[10]

That the Court did not "undo" a Government payment already made in these cases does not even come close to judicial approval of Government acceptance of prohibited transfers of unliquidated claims. The single Claims Act case concerning Government acceptance of a transfer prior to liquidation is a trial court decision and is, in any event, *sui generis*. In *NRG Co. v. United States* (US15 & n.5), the court permitted Government acceptance of a reassignment back to the original property owner to protect it from losing its Fifth Amendment takings claims. 31 Fed. Cl. 659, 663 (1994). Here, permitting Government acceptance would serve the contrary purpose of extin-

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[9] Consistent with ACE/Delmarva's position, the *McGowan* Court observed that "it has been several times declared by this court that the statute was intended solely for the protection of the Government and its officers during the adjustment of claims, and that, after allowance, the protection may be invoked or waived, as they in their judgment deem proper." 237 U.S. at 294 (emphasis supplied).

[10] PSEG alleges that *Martin* identifies "'[a]nother line of cases exhibit[ing] an opposing tendency'" to the cases on which ACE/Delmarva rely (P15). That line, however, is comprised of the cases cited by Respondents where the Government's obligation is already discharged, and the cases recognizing a "by operation of law" exception. *See Goodman v. Niblack*, 102 U.S. 556, 560-61 (1881) (P15) (Claims Act protections not applicable to assignments that are involuntary, but occur "by operation of law"); *see also United States v. Aetna Cas. & Sur. Co.*, 338 U.S. 366, 374-80 (1949) (US11, US14) (acknowledging that other line of cases and recognizing that an insurance company subrogated to an insured's claim is a transferee within the "by operation of law" exception).

guishing ACE/Delmarva's takings claims. In short, *NRG* supports ACE/Delmarva's position, not Respondents'.

Nor do Respondents' cases support their suggestion (US2, US10, US14; P11-12) that the Government is free to accept assignments simply because the Claims Act protections are for its benefit. They simply find that, where the Government does not need the Claims Act protections because it has nothing at stake, the statute has no effect on private disputes involving assignments.[11] Here, Respondents seek to absolve the Government from liability to both the assignor (by the assignment) and the assignee (by the offset), a position that stands both the statute and the Fifth Amendment on their heads.

III. THIS CASE IS APPROPRIATE FOR REVIEW BY THIS COURT

The validity of ACE/Delmarva's takings claims is not before this Court. Nonetheless, the United States argues (US16-17) that this case is not appropriate for review because ACE/Delmarva's claims are based on the Standard Contract, and courts in SNF cases have held such claims must be litigated as contract

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[11] This Court has never stated that only the Government may invoke the Claims Act (*see* US10). *Martin* (where the Government was not even a party) does not so state, and is just one of the many cases, like those cited by PSEG (P14), in which the Court has not permitted parties to invoke the Claims Act to resolve private differences where the Government has already discharged its obligation. 300 U.S. at 595; *see also Bailey*, 109 U.S. at 439; *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369 (1945). Moreover, this Court has permitted a private party to repudiate an assignment of an unliquidated claim under the Claims Act. *See Spofford*, 97 U.S. at 488-90 (cited in *Bailey*, 109 U.S. at 437).

claims.[12] In each case cited, however, the court dismissed the takings claim based on its specific facts and after finding that plaintiffs could pursue a remedy under the Standard Contract.[13] Moreover, in a number of SNF cases not cited, courts rejected motions to dismiss takings claims even where plaintiffs also raised contract claims, pending trial or the development of a more comprehensive record to determine the scope of the takings and contract claims. *See, e.g., Consol. Edison Co. of New York, Inc. v. United States*, 67 Fed. Cl. 285, 291-92 (2005); *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 172-73 (2005); *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 302-03 (2003); *see also Rochester Gas*, 65 Fed. Cl. at 442 (plaintiff may have both contract and takings claims). Thus, it would not be appropriate for this Court to address the validity of ACE/Delmarva's takings claims at this juncture.

Moreover, the arbitration award does not moot this case (*see* P18-21).[14] That award was issued in a private

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[12] The appropriate way to raise this issue would be in trial court as a motion: (1) to dismiss under Fed. R. Civ. P. 12(b)(6), where the only question would be whether "'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim,'" *Sys. Fuels, Inc. v. United States*, 65 Fed. Cl. 163, 168 (2005) (citation omitted), or (2) for summary judgment under Fed. R. Civ. P. 56(c), where the court would evaluate issues in the light most favorable to ACE/Delmarva and grant the motion only if no genuine issue of fact exists, *id.* at 169. This Court is not in a position to make such determinations now.

[13] *See Sys. Fuels, Inc. v. United States*, 78 Fed. Cl. 769, 809 (2007); *N. States Power Co. v. United States*, 78 Fed. Cl. 449, 472 (2007); *Pac. Gas & Elec. Co. v. United States*, 70 Fed. Cl. 766, 779-80 & nn.13 & 14 (2006); *Canal Elec. Co. v. United States*, 65 Fed. Cl. 650, 655-56 (2005).

[14] *Segal v. Rochelle*, 382 U.S. 375 (1966), cited by PSEG (P19), does not deal with an arbitration award and does not support

proceeding between ACE/Delmarva and PSEG. It did not involve, much less bind, the Government. ACE/Delmarva's claims here are not against PSEG; they are against the Government.[15] Moreover, while the award determined that ACE/Delmarva had assigned their claims, the New Jersey court affirming the award found that it left open the question of the effect of the assignment (P9). Both courts below subsequently found the award invalid under the Claims Act (36a; 6a). The question here is whether the Government's acceptance of the assignment somehow validates it, not whether there was an assignment confirmed by the arbitration award. Far from rendering this case moot, the award is simply irrelevant.

PSEG's argument that the arbitration award is conclusive, but instead supports the distinction made by ACE/Delmarva in Section II of this brief between unallowed claims and those for which a payment has been made. *Segal*, addressing the question of the transferability of claims within the meaning of the bankruptcy code, reaffirmed *Martin*, in which the Claims Act protections were held not to apply after the claims had been collected. *See supra* pp. 6-7. The Court further noted that it had previously ruled in *United States v. Shannon*, 342 U.S. 288 (1952), "that one holding a claim invalidly assigned under [the Claims Act] may not sue the Government upon it though he join his assignor as well." 382 U.S. at 384-85. And, while the *Segal* Court observed that a state court could compel an assignor to pay over a refund received or even to collect the claim, it could only compel the assignor to "make it over by a valid assignment when that became possible," in other words, after the claim has been allowed. *Id.* at 385. There is simply nothing in *Segal* to suggest that a state court can compel an assignment of a not yet allowed claim.

[15] *Vermont Yankee Nuclear Power Corp. v. United States*, 84 Fed. Cl. 339 (2008), cited by PSEG (P21), is not conclusive. That decision was based on the trial court's detailed interpretation of the contract at issue there. Moreover, the ruling is not binding on this Court and is, in any event, the subject of a pending appeal (Fed. Cir. Case No. 2009-5029).

IV. THE COURT SHOULD GRANT CERTIORARI TO PROTECT THE INTERESTS OF ELECTRIC RATEPAYERS NATIONWIDE

ACE/Delmarva's claims against the Government, while they involve tens of millions of dollars, are not unique. As noted by Amicus National Association of Regulatory Utility Commissioners, representing utility commissions in all fifty states, this case "presents a question of law central to the responsibility of State regulators to balance the interests of retail customers and utilities" and will affect the interests of millions of electric customers in multiple states (Amicus Brief at 5).[16] This Court should grant certiorari to answer that important question, which will arise not only in the other SNF cases currently pending against the Government, but in any case in which the Government seeks to utilize its proposed new waiver device to avoid liability for a taking.

Respectfully submitted,

FREDERICK M. LOWTHER
Counsel of Record
RICHARD J. CONWAY
BETH L. WEBB
JOAN M. DARBY
JANET M. ROBINS
DICKSTEIN SHAPIRO LLP
1825 Eye Street, NW
Washington, DC 20006
(202) 420-2200
Counsel for Petitioners

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[16] While PSEG argues (P3) that the New Jersey Board of Public Utilities found that the sale price of ACE/Delmarva's property was fair, the consequences of the Government's action were known at that point, and the price was considered fair taking into account the effect of the Government's taking.